CIMB Islamic Bank Bhd v LCL Corp Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL ACTION NO D-22A-457 OF 2010
ASMABI MOHAMAD JC
20 MAY 2014

Banking — Banks and banking business — Islamic banking — Bank granted facility to borrower under principle of Al-Bai Bithaman Ajil — Hibah — Default in payment by borrower — Action taken by borrower's managing director and principal shareholder — Whether there was locus standi to initiate action — Allegations instruments not in conformity with the Shariah principle of financing — Whether proved — Whether Al-Bai Bithaman Ajil transactions infringed ss 67 and 67A of the Companies Act 1965 — Whether transactions entered into between tainted with duress, coercion, threats and misrepresentation

The plaintiff was a bank while the first defendant was a company that had been wound up by a third party. The second defendant was the managing director and principal shareholder of the first defendant. The plaintiff had granted a term facility under the principle of *Al-Bai Bithaman Ajil* ('BBA') for the sum of RM48.5m to the first defendant. The second defendant executed letter of *hibah*, conveying 16 million shares owned by him in the first defendant ('the asset') to the first defendant to enable the first defendant to enter into an asset purchase agreement with the plaintiff ('the APA'). Under the APA, the plaintiff purchased the asset at the purchase price of RM12,125,000 and later sold the asset back to the first defendant pursuant to the asset sale agreement ('the ASA') at a sale price of RM16,087,500. The transactions were repeated a further three times on the same date with the same asset. In consideration of and by way of security for the BBA facility, the first defendant executed a memorandum of deposit of securities to pledge a sum of RM300,000 together with all his rights and interests to the plaintiff. In consideration of and by way of security for the BBA facility, the second defendant pledged the asset, the 16 million shares of the first defendant owned by the second defendant together with all his rights and interests to the plaintiff ('the memorandum'). The first defendant defaulted in the payment of the monthly installments and the plaintiff in the exercise of its rights under the memorandum sold the pledged shares. The plaintiff's claim against the second defendant was for the shortfall under cl 6.1 of the memorandum. This court had allowed summary judgment to be entered against both the defendants. Dissatisfied with the said decision, the first and second defendants appealed to the Court of Appeal but the appeal was dismissed. On appeal, the Federal Court had allowed the second defendant's appeal and remitted this case to this court to be heard. The first defendant had not obtained leave of the court to proceed with the appeal against the said

summary judgment and therefore, the summary judgment still remained against the first defendant. The second defendant refuted the plaintiff's claim and argued that, inter alia, the said BBA transactions were tainted with illegality as these transactions were not in compliance with the Syariah principle of financing premised on the *bai' inah* principle; the said transactions were prohibited by ss 67 and 67A of the Companies Act 1965 ('the CA') and therefore these transactions were invalid and unenforceable in law; the legal documentations for the BBA transactions and the memorandum were executed under duress; the plaintiff had misrepresented to the second defendant that the second defendant's liability was only limited to the values of the shares he had pledged as security for the due payment of the BBA facilities; and that parts of the memorandum were surreptitiously inserted without the second defendant's knowledge. The issues for the court's determination were whether the second defendant had the locus standi to challenge the legality of the second BBA transactions; whether the APA, ASA and letters of hibah were in conformity with the Shariah principle of financing and legally binding; whether the BBA transactions had infringed ss 67 and 67A of the CA; whether the transactions entered into between the defendants and the plaintiff were tainted with duress, coercion threats and misrepresentation.

Held:

(1) The memorandum was not only a charge but it also provided a personal guarantee by the second defendant. On that premise alone and in the light of decision in *Bank Kerjasama Rakyat Malaysia Bhd v Sea Oil Mill (1979) Sdn Bhd & Anor*, the second defendant was not in a position to question the legality of the BBA transaction entered into by the plaintiff and the first defendant. The second defendant had no locus to challenge the legality of the transactions entered into between the plaintiff and the first defendant (see para 76).

(2) The transactions that were undertaken by the plaintiff had met with the requisite features of financing premised on the *bai' inah* contract despite the same asset having been used in the four APAs and four ASAs executed by the plaintiff and the first defendant. Hence, there was no room for the second defendant to claim that it was a sham and illegal transactions. Therefore, the transactions entered into ought to be honoured and enforced by this court (see para 95).

(3) There are no provision regarding the dealing of a company in its own shares being provided under the Islamic Banking Act 1983 ('the IBA'). Hence, there was no inconsistency in the actual terms or direct conflict for the issue of repugnancy to arise. In such a case, s 67 of the CA must be complied with. Any rebuttal to the non-compliance must be dealt with. The IBA is regulatory in nature and does not provide for comprehensive and substantive law as the one covered under the CA. The court should

not allow the reliance on s 2 by the Islamic Bank simpliciter for avoiding its compliance with the existing valid legislation (see paras 112–113).

(4) The second defendant had not shown that there were elements of duress involved in the transactions entered into between the two parties. The certified true circular resolution passed by the BOD proved that the first BBA was considered and passed by the BOD of the first defendant and was voluntarily made. The resolutions by the BOD were deliberated, considered and approved by the BOD of the first defendant which consisted of eminent, highly respectable and knowledgeable person. The second defendant had not adduced evidence to demonstrate how this strong BOD of the first defendant could be coerced by the plaintiff (see para 117).

(5) The second defendant had never raised the issue of duress, coercion and threats in his affidavits despite five affidavits having been filed. Therefore, the second defendant's defence of duress, coercion and threats was an afterthought to defeat the plaintiff's claim. If it was a genuine claim it would have been raised at the earliest possible opportunity opened to the second defendant. Hence, the issue of duress, coercion and threats had not been proven on the standard required by the law (see para 118).

(6) The second defendant was a very experienced businessman having the benefit of the assistance of his financial manager and company secretary to advise him on the corporate aspects of his business. He also had the benefit of the in house legal person to advise him on all legal matters. The second defendant had every opportunity to check the words of the BBAs and the BODs to protect his interest before he executed the same. Therefore, the second defendant could not fault the plaintiff if he later discovered that there were clauses which were detrimental to him. It is a basic and cardinal principle in contract that a person who had executed a document would be bound by the words of the document unless if he could show that the documents were executed under duress, misrepresentation and/or fraud. It is settled law that a party who had signed a document is bound by the terms and language of the document unless that party could show that there were elements of fraud, duress or misrepresentations involved (see para 121).

[Bahasa Malaysia summary

Plaintif adalah bank manakala defendan pertama adalah syarikat yang telah digulungkan oleh pihak ketiga. Defendan kedua adalah pengarah urusan dan pemegang saham utama defendan pertama. Plaintif telah memberikan kemudahan berjangka di bawah prinsip of *Al-Bai Bithaman Ajil* ('BBA') untuk jumlah RM48.5 juta kepada defendan pertama. Defendan kedua telah menandatangani surat *hibah*, memindahhakkan 16 juta saham milik defendan pertama ('aset') kepada defendan pertama untuk membolehkan defendan

pertama memasuki perjanjian belian aset dengan plaintif ('PBA'). Di bawah PJA itu, plaintif telah membeli aset pada harga RM12,125,000 dan kemudian menjual aset itu semula kepada defendan pertama menurut perjanjian jualan aset ('PJA') pada harga jualan RM16,087,500. Transaksi-transaksi diulangi sebanyak tiga kali lagi pada tarikh sama dengan aset yang sama. Sebagai balasan untuk dan melalui sekuriti bagi kemudahan BBA, defendan pertama telah memasuki memorandum deposit sekuriti untuk mencagarkan sejumlah RM300,000 bersama semua hak dan kepentingannya kepada plaintif. Sebagai balasan untuk dan melalui sekuriti bagi kemudahan BBA, defendan kedua mencagarkan aset, 16 juta saham defendan pertama yang dimiliki oleh defendan kedua bersama semua hak dan kepentingannya kepada plaintif ('memorandum'). Defendan pertama telah gagal dalam bayaran ansuran bulanan dan plaintif dalam melaksanakan haknya di bawah memorandum telah menjual saham-saham yang dicagar. Tuntutan plaintif terhadap defendan kedua adalah untuk kekurangan di bawah fasal 6.1 memorandum itu. Mahkamah ini telah membenarkan penghakiman terus dimasukkan terhadap kedua-dua defendan. Tidak berpuas hati dengan keputusan tersebut, defendan-defendan pertama dan kedua telah merayu kepada Mahkamah Rayuan tetapi rayuan itu telah ditolak. Atas rayuan, Mahkamah Persekutuan telah membenarkan rayuan defendan kedua dan meremitkan kes ini kepada mahkamah untuk didengar. Defendan pertama tidak memperoleh kebenaran mahkamah untuk meneruskan rayuan itu terhadap penghakiman terus tersebut dan oleh itu, penghakiman terus masih kekal terhadap defendan pertama. Defendan kedua menafikan tuntutan plaintif dan berhujah bahawa, antara lain, transaksi-transaksi BBA tersebut dicemari dengan ketaksahan kerana transaksi-transaksi tersebut tidak mematuhi prinsip kewangan Syariah yang berlandaskan prinsip *bai' inah*; transaksi-transaksi tersebut dilarang oleh ss 67 dan 67A Akta Syarikat 1965 ('AS') dan oleh itu transaksi-transaksi tersebut adalah tidak sah dan tidak boleh dikuat kuasakan dari segi undang-undang; dokumentasi sah untuk transaksi-transaksi BBA dan memorandum itu telah dilaksanakan di bawah desakan; plaintif telah memberi gambaran salah kepada defendan kedua bahawa liabiliti defendan kedua hanya terhad kepada nilai saham yang dicagarkannya sebagai sekuriti untuk bayaran yang perlu dibayar untuk kemudahan BBA itu; dan bahawa terdapat bahagian memorandum yang dimasukkan secara sembunyi tanpa pengetahuan defendan kedua. Isu-isu untuk ditentukan mahkamah adalah sama ada defendan kedua mempunyai locus standi untuk mencabar kesahan transaksi-transaksi BBA kedua; sama ada PBA, PJA dan surat *hibah* adalah teratur menurut prinsip kewangan Syariah dan mengikat secara sah; sama ada transaksi-transaksi BBA melanggar ss 67 dan 67A AS; sama ada transaksi-transaksi yang dimasuki antara defendan-defendan dan plaintif dicemari dengan desakan, ugutan secara paksaan dan gambaran salah.

Diputuskan:

(1) Memorandum itu bukan sahaja cagaran tetapi ia juga memberikan jaminan peribadi oleh defendan kedua. Berdasarkan premis itu sahaja dan juga keputusan dalam kes *Bank Kerjasama Rakyat Malaysia Bhd v Sea Oil Mill (1979) Sdn Bhd & Anor*, defendan kedua bukan dalam kedudukan untuk mempersoalkan kesahan transaksi BBA yang dimasuki oleh plaintif dan defendan pertama. Defendan kedua tiada locus untuk mencabar kesahan transaksi yang dimasuki antara plaintif dan defendan pertama (lihat perenggan 76).

(2) Transaksi yang dilaksanakan oleh plaintif memenuhi ciri-ciri yang diperlukan untuk pembiayaan yang berdasarkan kontrak bai' inah meskipun aset yang sama digunakan dalam empat PBA dan empat PJA dimasuki oleh plaintif dan defendan pertama. Justeru, tiada ruang untuk defendan kedua mendakwa bahawa ia satu penipuan dan transaksi-transaksi menyalahi undang-undang. Oleh itu, transaksi-transaksi yang dimasuki patut diteruskan dan dikuatkuasakan oleh mahkamah ini (lihat perenggan 95).

(3) Tiada peruntukan berkaitan syarikat dalam menguruskan sahamnya sendiri diperuntukan di bawah Akta Perbankan Islam 1983 ('API'). Justeru, tiada percanggahan dalam terma sebenar atau konflik secara langsung untuk isu yang bertentangan timbul. Dalam kes sebegini, s 67 AS perlu dipatuhi. Apa-apa pematahan terhadap ketidakpatuhan perlu diuruskan. API adalah bersifat kawal selia dan tidak memperuntukan undang-undang yang komprehensif dan substantif sebagai suatu yang terangkum di bawah AS. Mahkamah tidak patut membenarkan kebergantungan pada s 2 oleh simpliciter bank Islam kerana mengelak daripada mematuhi perundangan sah yang sedia ada (lihat perenggan 112–113).

(4) Defendan kedua tidak menunjukkan bahawa terdapat elemen-elemen desakan yang terbabit dalam transaksi-transaksi yang dimasuki antara kedua-dua pihak. Resolusi pekeliling sebenar sah yang diluluskan oleh lembaga pengarah membuktikan bahawa BBA pertama dipertimbangkan dan diluluskan oleh lembaga pengarah defendan pertama dan dibuat secara sukarela. Resolusi oleh lembaga pengarah telah dibincang, dipertimbang dan diluluskan oleh lembaga pengarah defendan pertama yang terdiri daripada individu yang terkenal, amat dihormati dan luas pengetahuan. Defendan kedua tidak mengemukakan keterangan untuk menunjukkan bagaimana lembaga pengarah defendan pertama yang kukuh boleh dipaksa oleh plaintif (lihat perenggan 117).

(5) Defendan kedua tidak pernah menimbulkan isu desakan, paksaan dan ugutan dalam afidavit-afidavitnya meskipun lima afidavit telah difailkan. Oleh itu, pembelaan defendan kedua tentang desakan, paksaan dan ugutan adalah suatu yang difikirkan kemudian untuk mengalahkan tuntutan plaintif-plaintif. Jika ia adalah tuntutan yang sebenar ia patut

telah ditimbulkan seawal yang mungkin bagi memberi peluang kepada defendan kedua. Justeru, isu desakan, paksaan dan ugutan tidak dapat dibuktikan atas standard yang dikehendaki oleh undang-undang (lihat perenggan 118).

(6) Defendan kedua merupakan ahli perniagaan yang amat berpengalaman yang mendapat manfaat daripada bantuan pengurus kewangan dan setiausaha syarikatnya untuk menasihatnya tentang aspek-aspek korporat perniagaannya. Dia juga mendapat manfaat daripada pegawai undang-undang dalaman untuk menasihatnya tentang semua hal perundangan. Defendan kedua mempunyai banyak peluang untuk memeriksa perkataan-perkataan berhubung BBA dan lembaga pengarah untuk melindungi kepentingannya sebelum dia melaksanakan hal yang sama. Oleh itu, defendan kedua tidak boleh mempersalahkan plaintif jika dia kemudian menyedari bahawa terdapat fasal-fasal yang memudaratkannya. Adalah prinsip asas dan penting dalam kontrak di mana seseorang yang menandatangani dokumen akan terikat dengan perkataan-perkataan dokumen itu kecuali jika dia boleh menunjukkan bahawa dokumen-dokumen tersebut ditandatangani di bawah desakan, gambaran salah dan/atau fraud. Ia adalah undang-undang tetap bahawa satu pihak yang menandatangani dokumen adalah terikat dengan terma dan bahasa dokumen itu kecuali pihak tersebut boleh menunjukkan bahawa terdapat elemen-elemen fraud, desakan atau nyata salah yang terlibat (lihat perenggan 121).]]

Notes

For cases on Islamic banking, see 1(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 2555–2583.

Cases referred to

Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals [2009] 6 MLJ 839; [2010] 6 CLJ 22, CA (folld)

Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd [2003] 2 MLJ 408; [2003] 1 CLJ 625, CA (folld)

Bank Kerjasama Rakyat Malaysia Bhd v Sea Oil Mill (1979) Sdn Bhd & Anor [2010] 2 MLJ 740; [2010] 1 CLJ 793, FC (folld)

CIMB Islamic Bank Bhd v LCL Corp Bhd & Anor [2012] 3 MLJ 869, HC (refd)

Co-operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd [1995] 3 MLJ 313, FC (folld)

Ginlon (M) Sdn Bhd v MBF Finance Bhd [2004] 2 MLJ 641, CA (refd)

L'Estrange v F Graucob Ltd [1934] 2 KB 394 (refd)

Lori (M) Bhd (interim receiver) v Arab- Malaysian Finance Bhd [1999] 3 MLJ 81, FC (folld)

M Karunanidhi v Union of India, AIR 1979 SC 898; (1979) 3 SCC 431, SC (refd)

Pacific Bank Bhd, The v Vimla Textiles & Ors [2004] MLJU 197; [2004] 6 CLJ 406, HC (refd)
Pao On v Lau Yin Long [1979] 3 All ER 65, PC (refd)
Perumahan Wira Seberang Sdn Bhd v Hong Leong Finance Bhd [1999] 5 MLJ 549, HC (folld)
Sia Siew Hong & Ors v Lim Gim Chian & Anor [1995] 3 MLJ 141; [1996] 3 CLJ 26, CA (refd)
Tan Chong And Sons Motor Co Ltd v Yang Chin Lang [1967] 1 MLJ 123 (refd)
Tekital Sdn Bhd v Sarina bt Kamaludin & Ors [2012] 8 MLJ 734, HC (refd)
Wan Salimah bte Wan Jaafar v Mahmood bin Omar (Anim bte Abdul Aziz, intervener) [1998] 5 MLJ 162, HC (refd)
Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co, Ltd and others [2006] 4 SLR 451, HC (refd)

Legislation referred to

Central Bank of Malaysia Act 2009 s 56(1)(B)
Companies Act 1965 ss 67, s 67(1), (2), (3B), (6), 67A, 67A(1), (2)(b), (3A), (3B)
Companies Act (Cap 50, 1994 Rev Ed) [SG] s 76
Contracts Act 1950 ss 24 , 79, 81
Islamic Banking Act 1983 ss 2, 55
Rules of Court 2012 O 14

Mohamed Ismail bin Mohd Shariff (John Wong Yok Hon and Fitriyah Abdullah with him) (Azim, Tunku Farik & Wong) for the plaintiff.
Tan Keng Teck (Lui Kar Yee and Mohamad bin Burok with him) (Lim Kian Leong & Co) for the second defendant.

Asmabi Mohamad JC:

BRIEF BACKGROUND

[1] The plaintiff is a licensed bank established in Malaysia with its address at 10th Floor, CIMB Building, Jalan Semantan, Damansara Heights, 50490 Kuala Lumpur. The first defendant is a company incorporated under the Companies Act 1965 and had since 17 June 2011 been wound up by a third party. The second defendant is an individual and was at the material times the managing director and principal shareholder of the first defendant. Pursuant to a letter of offer dated 17 April 2009 ('letter of offer') the plaintiff had granted a term facility under the principle of *Al Bai Bithaman Ajil* ('BBA') for the sum of RM48,500,000 to the first defendant.

[2] Pursuant to the terms of the letter of offer, the second defendant executed letter of *hibah* dated 24 April 2009 whereby the second defendant conveyed by way of gift (*hibah*) 16 million shares owned by him in the first

defendant ('the asset') to the first defendant to enable the first defendant to enter into asset purchase agreement dated 24 April 2009 with the plaintiff ('the APA'). Under the APA, the plaintiff purchased the asset at the purchase price of RM12,125,000 and thereafter sold the asset back to the first defendant pursuant to the asset sale agreement dated 24 April 2009 ('the ASA') at a sale price of RM16,087,500. Thereafter, the first defendant voluntarily conveyed by way of gift (*hibah*) to the second defendant, the asset.

[3] The transactions were repeated a further three times on the same date with the same asset. The total purchase price for the BBA facility, being the aggregate sum of the purchase price under the four APAs were RM48,500,000 and the total sale price, being the aggregate of the four ASAs were RM64,350,000.

[4] All of the above referred as 'the BBA transactions'. In consideration of and by way of security for the BBA facility, the first defendant executed a memorandum of deposit of securities dated 24 April 2009 to pledge a sum of RM300,000 together with all his rights and interests therein to the plaintiff. The said sum was utilised to pay the stamp duties for the agreements entered into between parties leaving a balance sum of RM12,777.78.

[5] In consideration of and by way of security for the BBA facility, the second defendant who was the managing director and principal shareholder of the first defendant executed a memorandum of deposit of securities (third party) dated 24 April 2009 pledging the asset, the 16 million shares of the first defendant owned by the second defendant together with all his rights and interests therein to the plaintiff ('the memorandum of deposit').

[6] The first defendant defaulted in the payment of the monthly installments and the plaintiff in the exercise of its rights under the memorandum sold the pledged shares on 11 February 2009 at the price of RM3,666,822.80.

[7] The plaintiff's claim against the second defendant is for the shortfall pursuant to cl 6.1 of the memorandum of deposit. The amount due and owing after accounting for the sale proceeds was RM54,442,744.78 as at 18 November 2010 (see p 14 para 13 (a) of document A1) until date of full settlement.

[8] On 9 February 2011, on the application of the plaintiff, this court had allowed summary judgment to be entered against both the defendants. Dissatisfied with the said decision, the first and second defendants appealed to the Court of Appeal Malaysia against the whole decision which was dismissed by the Court of Appeal on 6 October 2011. After having obtained leave and

upon hearing the substantive appeal, the Federal Court had allowed the second defendant's appeal against the learned judge's decision to enter summary judgment against him and remitted this case to this court for the same to be heard on the merits.

[9] The first defendant was not a party to the hearing before me as it was wound up on 17 June 2011 after the summary judgment was entered against it and it had not obtained leave of the court to proceed with the appeal against the said summary judgment. Therefore, the summary judgment still remains against the first defendant.

[10] The second defendant refuted the plaintiff's claim and had raised various defences to the claim, amongst others, the second defendant alleged, firstly that the said BBA transactions were tainted with illegality as these transactions were not in compliance with the Shariah principle of financing premised on the *bai'inah* principle. Secondly the said transactions were prohibited by s 67 and 67A of the Companies Act 1965 ('Act 125') and therefore these transactions were invalid and unenforceable in law. Further the second defendant claimed that the BBA transactions were fictitious and a sham. The second defendant claimed that as a consequence of this illegality the memorandum of deposit executed by the second defendant was invalid, void and unenforceable. That being the position the plaintiff was not entitled to exercise its right to sell the security pledged by the second defendant as the security to these BBA transactions to satisfy the indebtedness. In addition to that, the second defendant claimed that the legal documentations for the BBA transactions and the memorandum of deposit were executed under duress. The second defendant had also claimed that the plaintiff had misrepresented to the second defendant that the second defendant's liability was only limited to the values of the shares he had pledged as security for the due payment of the BBA facilities. Lastly, the second defendant had also claimed that parts of the memorandum of deposit were surreptitiously inserted without the second defendant's knowledge.

[11] Therefore the second defendant counterclaimed against the plaintiff the sum of RM35,520,000 for special para (e) A-2 as damages suffered by him as a result of the unlawful disposal of his shares by the plaintiff which had resulted in the collapse of the first defendant. The second defendant had also sought a declaration that the transactions entered into were null and void.

[12] This case proceeded by way of a full hearing with five witnesses having testified for the plaintiff and three witnesses testified for the second defendant.

[13] After giving full consideration to the evidence, both documentary as well as testimonial, and the submissions by all learned counsel for the respective

parties on 10 January 2014, I allowed the plaintiff's claim against the second defendant with costs. After being satisfied that, the second defendant had not established its counterclaim against the plaintiff, I therefore dismissed the second defendant's counterclaim with costs. After a brief submission on the issue of costs I awarded cost of RM70,000 to the plaintiff.

[14] Aggrieved by the said decision the second defendant appealed to the Court of Appeal against the whole of the said decision.

THE DOCUMENTS

[15] The relevant documents referred to in the course of this trial were as follows:

	Documents	Marked
i.	amended bundle of pleadings	A1
ii.	additional amended bundle of pleadings	A2
iii.	common bundle (Part B, Vol 1)	B1
iv.	common bundle (Part B, Vol 2)	B2
v.	second defendant's additional bundle (1)	B3
vi.	second defendant's additional bundle (2)	B4
vii.	plaintiff's additional bundle	B5
viii.	bundle of affidavits second defendant's additional bundle (3)	B6
ix.	issues to be tried	C
x.	agreed facts	D
xi.	summary of plaintiff's case	E
xii.	summary of second defendant's case	F
xiii.	plaintiff's opening statement	G
xiv.	second defendant's opening statement	H

ISSUES TO BE TRIED

[16] The 'issues to be tried' were as stated in the document marked as 'C'. Other issues not mentioned below were all ancillary issues. In a nutshell the salient issues centered around:

(a) whether the second defendant has the locus standi to challenge the legality of the second BBA transactions;

(b) whether the asset purchase agreements, asset sale agreements and the letters of *hibah* were in conformity with the Shariah principle of financing and legally binding;

(c) whether the BBA transactions had infringed s 67 and 67A of the

Companies Act 1965 (Act 125) and therefore illegal and unenforceable;

(d) whether the transactions entered into between the defendants and the plaintiff were tainted with duress, coercion and threats; and

(e) whether the transactions entered into between the defendants and the plaintiff were tainted with misrepresentation.

THE TRIAL

The plaintiff's case

[17] Five witnesses testified for the plaintiff. They were Goh Sin Tat, Hueye Lin Kah Fun, Agnes Lim Geok Ching, Mohd Tarmimi bin Mohd Tarmizi and Eddy Chong Hock Chuan (PW1, PW2, PW3, PW4 and PW5) respectively. The plaintiff's claim against the second defendant was premised on the memorandum of deposit of securities (third party) dated 24 April 2009 ('MOD 2') (see pp 94–114 of B1).

STA

[18] The first defendant was granted a short term advance ('STA') of RM50m as documented in the letter of offer from CIMB Bank Bhd dated 21 September 2007 ('STA letter of offer') (see pp 126–144 of B1). The letter of offer was accepted by the second defendant who was the managing director of the first defendant. The purpose of the STA was for working capital use to bridge the timing gap between the receipts of proceeds from the proposed rights issue exercise and the immediate working capital requirement. The first defendant was supposed to utilise the proposed rights issue proceeds towards the settlement of the STA of RM50m. As the proposed rights issue to be undertaken by the first defendant did not materialise, the first defendant was unable to pay the STA.

[19] Due to the weak market conditions at that time, the proposed rights issue exercise, which was supposed to raise the monies for repayment of the STA, was deferred. Since March 2008, PW2 together with the finance/account team of the bank were monitoring the first defendant's capacity to meet the repayment date.

[20] The first defendant had requested the bank to term out the repayment of the STA beyond its 8+2 months tenure as it was unlikely that the rights issue exercise would take place at that juncture and the first defendant was unable to raise enough cash from its operation to meet its repayment obligations. Discussions were held between the bank and the first defendant on the various options opened to the first defendant to resolve the financial problem faced by

first defendant, amongst others, the idea of rescheduling or restructuring the STA and/or the refinancing the STA into an Islamic term facility.

First BBA

[21] As a result of series of discussions between the plaintiff and the defendants, the first defendant had agreed to restructure its conventional loan to a financing facility premised on the Shariah principle of financing known as the *Al Bai Bithaman Ajil* ('BBA'). Pursuant to these discussions a letter of offer dated 31 July 2008 first letter of offer (see pp 170–190 of B1) was issued by the plaintiff to the first defendant whereby the plaintiff had agreed to grant a BBA facility of RM50m to the first defendant and this was accepted by the second defendant as the managing director of the first defendant ('first BBA').

[22] The first BBA facility was secured by:

(a) third party memorandum of deposit and letter of set off for 16 million of first defendant's shares;

(b) irrevocable undertaking letter from the first defendant that the proceeds from private placement exercise and rights issue exercise would be prioritised towards the settlement of the BBA;

(c) irrevocable undertaking letter from the first defendant that at least 40% of proceeds from local projects would be channelled to meet repayment of the first BBA; and

(d) rrevocable letter of subordination of shareholders loans and advances. (see pp 217–232 and 254–256 of B1)

[23] Pursuant to a memorandum of deposit dated 23 September 2008 ('MOD 1') (see p 217 of B1) executed by the second defendant the shares worth 16m in the first defendant belonging to the second defendant was pledged as a security for the first BBA facility. These shares become part of additional security required as part of the consideration given to the bank to restructure the loan and lengthen the repayment period.

[24] In consideration of the first defendant's request of indulgence in time, the bank requested the first defendant to provide additional security however there was none that the first defendant could provide except for the shares in the first defendant held by second defendant. The bank knew that these shares were available after the second defendant's personal loan was paid off. As there was no other form of security available to the bank for consideration and as the relationship between the plaintiff and the first and second defendants were cordial the bank accepted the only unencumbered security in the form of 16

million shares in the first defendant as the underlying asset for the first BBA facility and to pledge those shares as security for the first BBA facility.

[25] The second defendant had executed the security documents mentioned in para 21 above voluntarily and without any duress or threat and with the benefit of time and opportunity to seek legal advice pertaining to the legality of the documentation involved and/or to seek alternative financing from other financial institutions to refinance the conventional loan taken from the bank.

[26] The conventional loan granted by CIMB Bank Bhd to the first defendant would be in default and the bank would have proceeded with the recovery action much earlier if the said loan had not been restructured in the form of the first BBA mentioned above. Despite the restructuring of the conventional loan to that of the first BBA to assist the first defendant to settle the amount owed under the conventional loan, the first defendant was still unable to resolve its financial standing. The time under the first BBA lapsed and the first defendant was still unable to resolve its financial standing. The first defendant had only paid the sum of RM1.5m which sum was paid without any protest or allegation of duress.

[27] As a result of the failure on the part of the first defendant to meet its obligations under the first BBA and there was no room for the first BBA to be restructured or rescheduled, parties had to enter into another BBA transaction to facilitate the rescheduling of the first BBA. Prior to the execution of the documentation for the purpose of another BBA transaction there were discussions held between PW1, PW2 and the second defendant as the managing director of the first defendant on plans, status of collection of the first defendant and how the first defendant was preparing to meet its obligations under the first BBA.

Second BBA

[28] Pursuant to a letter of offer dated 17 April 2009 ('second letter of offer') (see pp 1–21 of document B1) between the plaintiff on the one part and the first defendant on the other, the plaintiff had granted a term facility under the *Al Bai Bithaman Ajil* principle for a sum of RM48,500,000 ('the second BBA') to the first defendant subject to the terms and conditions stated in the letter of offer.

[29] In this case, all parties to the transactions had agreed to enter into four (4) sets of agreements with the plaintiff to be executed one after the other, on the same date involving the same assets.

[30] By a letter of *hibah* dated 24 April 2009 from the second defendant who

was the registered owner of the asset, to the first defendant, the second defendant voluntarily gave the asset to the first defendant for the purpose of an APA (1) dated 24 April 2009 to be executed, whereby the first defendant sold the asset to the plaintiff at RM12,125,000 ('purchase price') (see pp 23–27 of document B1). The plaintiff then sold back this asset to the first defendant at RM16,087,500 ('sale price') vide an ASA (1) dated 24 April 2009 the payment of which was on deferred term as stipulated in the ASA (see pp 28–33 of document B1). Soon after that by another letter of *hibah* dated 24 April 2009, the first defendant conveyed the same asset, by way of *hibah* to the second defendant (see p 34 of document B1).

[31] The same process as illustrated above was repeated three more times one after the other in the same manner involving the same asset as was done in APA (1) and ASA (1). All together four 'APAs' and 'ASAs' all dated 24 April 2009 (at pp 23–33, 36–46, 49–59 and 62–72 of document B1) were executed and on the principle of *hibah* and in line with the Shariah principle of BBA. By this exercise the second defendant had through the *hibah* letters dated 24 April 2009 gave beneficial interest on 16 million units of his shares in the first defendant worth 9,440,000 (RM0.59 per unit) to the first defendant to enable the first defendant to obtain BBA facility from the plaintiff. Pursuant to the *hibah* letters dated 24 April 2009 the first defendant had given the second defendant the beneficial interests of the asset. The plaintiff had agreed to purchase and the first defendant had agreed to sell the said property for a price of RM48,500,000 ('plaintiff's purchase price'). The plaintiff had agreed to resell and the first defendant had agreed to repurchase the said property for RM64,350,000 ('plaintiff's selling price'). All these transactions were possible through four sets of APAs and ASAs.

[32] It was agreed that the first defendant would pay the second BBA facility as follows:

Date payment ought to be made	Minimum Payment sum	Reviewed Facility Limit
30 April 2009	RM500,000	RM48,000,000
31 May 2009	RM500,000	RM47,500,000
31 July 2009	RM500,000	RM46,500.000
31 August 2009	RM500,000	RM46,000,000
30 Sept 2009	RM5,500,000	RM40,500,000
31 Oct 2009	RM500,000	RM40,000,000
30 Nov 2009	RM500,000	RM39,500,000
31 Dec 2009	RM500,000	RM39,000,000
31 Jan 2010	RM1,500,000	RM37,500,000
28 Feb 2010	RM1,500,000	RM36,000,000
31 March 2010	RM1,500,000	RM34,500,000

30 April 2010	RM1,500,000	RM33,000,000
31 May 2010	RM1,500,000	RM31,500,000
30 June 2010	RM1,500,000	RM30,000,000
31 July 2010	RM1,500,000	RM28,500,000
31 August 2010	RM1,500,000	RM27,000,000
30 Sept 2010	RM1,500,000	RM25,500,000
31 Oct 2010	RM1,500,000	RM24,000,000
30 Nov 2010	RM1,500,000	RM22,500,000
31 Dec 2010	RM1,500,000	RM21,000,000
31 Jan 2011	RM2,000,000	RM19,000,000
28 Feb 2011	RM2,000,000	RM17,000,000
31 March 2011	RM2,000,000	RM15,000,000
30 April 2011	RM2,000,000	RM13,000,000
31 May 2011	RM2,000,000	RM11,000,000
30 June 2011	RM2,000,000	RM9,000,000
31 July 2011	RM2,000,000	RM7,000,000
31 Aug 2011	RM2,000,000	RM5,000,000
30 Sept 2011	RM2,000,000	RM3,000,000
31 Oct 2011	RM2,000,000	RM1,000,000
30 Nov 2011	RM1,000,000	0.00

[33] The rate of profit for the second BBA facilities had been fixed at a rate of 2.25% on the plaintiff's cost of fund ('effective profit rate') with an effective profit rate of not more than 12.25%. The profit was payable monthly on the date profit should be paid with the first payment of profit paid on 30 April 2009. If the first defendant failed to pay the plaintiff's selling price, when due or failed to pay any instalment, the plaintiff had the right, amongst others, to impose:

(a) *ta'widh* of 1.00% on the instalment due calculated from the date of default until the date of final settlement;

(b) if the facility had matured, *ta'widh* would be at the rate of Islamic current interbank money market rate on the principle sum until final settlement; and

(c) in any event, the BBA facility may be revoked on demand.

[34] The first defendant was tied to the statement of accounts issued by the plaintiff to verify the sum due and owed by the first defendant and all costs and legal fees on solicitor-client basis expended by the plaintiff in enforcing the ASAs and the APAs.

[35] As a consideration and security for the second BBA facility, the first defendant had signed the memorandum of deposit of Securities dated 24 April 2009 between the plaintiff on the one part and the first defendant on the other whereby the first defendant had deposited RM300,000 to the plaintiff together with all rights and interest of the first defendant through memorandum to the plaintiff. This sum was used as payment for the costs of stamp duties of the agreements signed as agreed and after the payment of stamp duties there was a sum of RM12,777.78 remaining held by the plaintiff for the first defendant that had not been used (see pp 74–93 of document B1).

[36] As a consideration and security for the BBA facility above, the second defendant signed the MOD 2 whereby the second defendant assigned all of the 16 million share units in the first defendant to the plaintiff together with all rights and interests of the second defendant through the MODs to the plaintiff (see pp 94–114 of document B1).

[37] All securities required for the second BBA were in accordance with the terms in the letter of offer dated 17 April 2009 and in conformity with the Shariah principle of financing premised on the BBA. All the relevant documents were executed by the second defendant either in his personal capacity or on behalf of the first defendant. At all times the second defendant was fully aware of the significance, effect and nature of all the transactions involved in the second BBA. The second BBA had given the first and second defendants more time and indulgence to pay the plaintiff the outstanding some due under the second BBA.

[38] Beside the abovementioned security, the following documents were also executed:

(a) irrevocable undertaking letter from the first defendant that the proceeds from the private placement exercise and rights issue will be prioritised towards settlement of the BBA;

(b) irrevocable undertaking letter from the first defendant that at least 40% of the proceeds from local projects would be channelled to meet repayment of the BBA; and

(c) irrevocable letter of subordination of shareholders loans and advances.

[39] Despite what was done and agreed by all parties, the first defendant was still unable to settle the amount due under the second BBA. The plaintiff then exercised its rights under cl 6.1 of both MODs (see pp 80 and 222 of document B1) to make the second defendant liable under the MODs as security provider, for any shortfall between the amount outstanding and the sale proceed. With regard to the second defendant's liability under the MODs, none of the plaintiff's officers had made any representations to the second defendant that

his liability was only limited to the value of the shares pledged as claimed by the second defendant. The second defendant fully understood the effect of the MODs executed by him and had voluntarily signed these MODs without any elements of threats, coercion misrepresentations and/or duress. In exercising its rights under the MODs, the plaintiff had given sufficient notice to the second defendant (see pp (D1) 260, (D2) 264–268 of document B1).

[40] The second defendant's claim that there were representations made to him by the plaintiff was a mere afterthought. Neither was there any element of duress or threat involved. Further the sale of the shares which were pledged by the second defendant as security for the second BBA could not have caused any loss to the first defendant as it was not the asset of the first defendant that was sold. Therefore, the sale of those shares could not have caused the collapse of the first defendant as claimed by the second defendant. If at all, the second defendant had suffered any loss by the sale of the shares, it was as a result of the second defendant's action in pledging those shares as security for the second BBA. Hence, the claim by the second defendant for any loss as a consequence of the sale of the shares was merely an afterthought.

[41] As a result of the first defendant's default in making payment for the amount due under the second BBA, the plaintiff had issued notice of demand dated 12 April 2010 (see pp 118–119 of document B1) for the first defendant to pay the outstanding sum being the shortfall after the plaintiff had exercised its rights under the MOD 2 by disposing the shares which belonged to the second defendant on 11 December 2009 at the price of RM3,666,822.80. Due to the failure of the first defendant to effect payment to the plaintiff, the plaintiff commenced this action in court to claim the sum of RM54,442,744.08, the particulars of which are as mentioned in the statement of claim filed herein. Hence, the plaintiff claimed from the defendant the sum stated therein and costs.

CASE FOR THE DEFENDANT

[42] Low Chin Meng, the managing director and a major shareholder of the first defendant at the material times testified for the second defendant ('DW1'). According to DW1, the first defendant was the holding company of various subsidiaries either in Malaysia or overseas. These subsidiaries of the first defendant were undertaking the business of an interior fit-out contractors and suppliers of fit-out materials locally and/or abroad.

[43] Around 2007, the first defendant through its subsidiaries secured numerous interior fit-out contract works from its Malaysian and overseas ventures, namely in the Middle East. These businesses were lucrative and based

on agreed contract price, for which the first defendant and its subsidiaries were expected to receive a profitable return of investment.

[44] Around the same time, the officers ('DW1 and DW2') from CIMB Investment Bhd ('CIMB Investment') who claimed that they were representing the CIMB Group, had approached the first defendant to discuss the possible methods of funding of ventures and contracts undertaken by the first defendant and its subsidiaries in the Middle East. These officers had represented to DW1 that CIMB Group which comprised of CIMB Bank Bhd ('CIMB Bank'), CIMB Investment Bank Bhd ('CIMB Investment') and CIMB Islamic Bank Bhd ('CIMB Islamic/the plaintiff') is a 'one-stop banking service' provider which provided universal banking, namely conventional, investment and Islamic banking to its customers. These services included essential banking and corporate advisory services.

[45] As the first defendant did not have the benefit of CIMB Investment as its corporate and financial advisor and/or banker prior to this, DW1 was impressed with the services proposed by the officers of CIMB Investment. DW1 had also realised for its business to flourish it must have a close repport with the bankers as this would facilitate and/or assist the first defendant and its subsidiaries in securing the financing for the purpose of the contracts and/or ventures it or its subsidiaries had undertaken. DW1 realised that good relationship between the first defendant and/or its subsidiaries and CIMB Investment too would be for the mutual benefits of both the first defendant as well as CIMB Investment. Due to this reason, the first defendant had agreed to appoint CIMB Investment to be its corporate and financial advisor.

[46] In order to raise the first defendant's capital flow for their ventures and businesses especially in the Middle East, as well as that of its subsidiaries, the officers of CIMB Investment had proposed to the first defendant that it could obtain its funding for the said purpose by way of a private placement exercise and a rights issue exercise which the officers of CIMB Investment guaranteed could be completed within one year. The officers of CIMB Investment were confident that both these exercises would be successful due to profitable return of investment to be secured by the first defendant in the Middle East.

[47] Whilst waiting for these two exercises to be completed, these officers had also proposed for the first defendant to secure a short term funding from its associated companies, namely CIMB Bank Bhd or the plaintiff. Based on the representations made by the officers of CIMB Investment, the first defendant had proceeded to appoint CIMB Investment to be its corporate and financial advisors and/or bankers to undertake the private placement and rights issue exercises. On or about 5 November 2007 the first defendant had successfully

completed its private placement exercise undertaken on 30 July 2007. Through this exercise it was able to raise RM35.95m to be used as working capital for the Middle East businesses and ventures.

[48] With regard to the rights issue exercise to be undertaken by the first defendant, CIMB Investment proposed to make the requisite announcement on 6 December 2007 and scheduled to be completed around June 2008. In the interim, whilst waiting for the rights issue exercise to be completed and in order to ensure availability of continuous cash flow to the first defendant and its subsidiaries to fund the Middle East ventures and/or businesses, the first defendant was advised by CIMB Investment to secure short term advance of RM50m. On 29 September 2007 with the assistance of CIMB Bank Bhd a facility worth RM50m was granted to the first defendant ('the conventional loan facility'). This loan was to be repaid by way the proceeds from the rights issue exercise to be undertaken by the first defendant which CIMB Investment was confident would be completed by or about June 2008 (see pp 126–144 of B1). Based on the professional advice of the officers of CIMB Investment that the loan could be repaid by way of the right issue exercise in due time, the first defendant accepted the advice and took the RM50m conventional loan facility. The security for the said conventional loan facility was an irrevocable letter of instruction issued by the first defendant to CIMB Investment for the proceeds of the rights issue exercise to be used to repay the said conventional loan facility (see p 254 of B1).

[49] The rights issue exercise did not materialise as planned and this had affected the first defendant's capability to pay the conventional loan facility granted to it. Due to this problem, the first defendant was directed by CIMB Investment and CIMB Bhd to secure a BBA facility from the plaintiff to enable the first defendant to pay the conventional loan facility.

[50] Pursuant to the first letter of offer issued by the plaintiff to the first defendant, the first defendant was granted the first BBA facility for the sum of RM50m for the purpose of repaying and refinancing the conventional loan facility (see pp 170–190 of B1 (the first BBA)). Due to the various representations made by the officers of CIMB, the first defendant accepted the said first BBA facility. Amongst the terms and conditions of the first BBA were:

(a) the first defendant was to enter into various asset purchase agreement ('APAs') and asset sale agreement ('ASAs') whereby the first defendant was to sell to the plaintiff its assets, being 16 million units ordinary shares of the first defendant owned by the second defendant, the value of which was up to RM50m and thereafter, the first defendant would repurchase the same assets from the plaintiff at a purchase price of RM62.250m;

(b) the tenure of the first BBA facility was 24 months;

(c) the payment of the purchase price was on a deferred and progressive monthly repayments to be paid by the first defendant with effect from 31 January 2009; and

(d) alternatively, if the first defendant was able to repay the purchase price to the plaintiff by way of the proceeds derived from the private placement exercise and/or the rights issue exercise to be undertaken by the first defendant then the repayment would be from the proceeds of the said exercises

(see pp 170–190 of document B1).

[51] The first defendant did not possess any other assets except the 16 million ordinary shares in the first defendant. However, the plaintiff, CIMB Bhd and CIMB Investment had unreasonably demanded that these 16 million shares formed the underlying asset for the APAs and the ASAs to be executed by both the plaintiff and the first defendant. After the execution of the APAs and ASAs the same shares would further be pledged by the second defendant as security for the APAs and ASAs. In the event the first defendant failed to adhere to this demand the plaintiff would immediately recall the conventional loan facility and demanded repayment of the entire facility. The plaintiff too would not grant the first BBA facility to the first defendant and the rights issue exercise undertaken by the first defendant would be affected. Other than the abovementioned consequences, it was intimated to DW1 that the first BBA were in order and that his liability with regard to the security would only be limited to his own 16 million shares only and nothing more.

[52] The first defendant was compelled to accept the plaintiff's offer for the first BBA to be executed under threats, duress and with assurances made by the officers of CIMB Investment as well as the plaintiff. The first defendant was also given a moratorium on the repayment of the sum due under the first BBA (see p 171 of B1). In addition to that, the first defendant was also assured that the first BBA premised on the Islamic principle of financing was no different from the conventional loan facility except unlike the conventional loan facility, interest on the sum granted to the plaintiff would not be chargeable as this is prohibited in Islam. These officers had also given the assurance that despite the value of the asset for the APAs being of 16 million units of ordinary shares which were well below RM50m, and/or the value of the asset for the ASAs were well below RM62.250m, the transactions to be entered into by the first defendant and the plaintiff were lawful and in accordance with the tenets of Islam. Further, DW1 was also assured that his liability under cl 8 of the memorandum was only limited to the value of the 16 million ordinary shares and not the whole sum of the first BBA facility. Based on the abovementioned conditions DW1 had agreed to pledge his shares in the first defendant as the

Security for the first BBA facility and executed the first MOD. It was also represented to DW1, the payment of any deficiencies after the shares had been disposed of shall be borne by the first defendant and not DW1 (see pp 224 and 229 of document B1).

[53] DW1 had executed the following documents for the purpose of the first BBAs:

(a) a letter of *hibah* dated 28 August 2008 in favour of the first defendant whereby the DW1 conveyed the 16 million shares in the first defendant to the first defendant by way of *hibah* or gift (see p 191 of document B1);

(b) the APA and ASA dated 28 August 2008 were executed between the first defendant and the plaintiff whereby the plaintiff purportedly purchased the 16 million shares from the first defendant at RM25m and sold back these 16 million shares to the first defendant at RM31.125m (see pp 192–195 and 196–202 of document B1);

(c) a letter of *hibah* dated 28 August 2008 whereby the first defendant re-conveyed the same asset to DW1; and

(d) the same process as illustrated above was repeated for the second time giving the impression that the parties were dealing with the asset worth RM50m in respect of the two APAs and RM62,250m in respect of the two ASAs (see p 203 of document B1).

[54] After the execution of the second APA and second ASA, the same assets were transferred by the first defendant to the second defendant by way of *hibah*. These assets were subsequently used by DW1 as security for the first BBAs (see pp 217 and 232 of document B1).

[55] Around the end of 2008, the first defendant and/or its subsidiaries were facing cash flow problem from their business ventures and businesses in the Middle East. The rights issue exercise undertaken by the first defendant too was delayed. Due to the financial crisis in 2008 and the slowing of the business ventures in the Middle East there was a substantial amount of receivables from the Middle East ventures still remained unpaid and yet to be collected by the first defendant from the employers of the first defendant and/or its subsidiaries. Attempts were made by the employers of these business ventures to repackage and/or to scale down the developments in the Middle East.

[56] In view of the problems faced by the first defendant to meet up with its financial obligations under the first BBA the plaintiff together with the CIMB Investment had directed that the plaintiff entered into a fresh BBA facility. Pursuant to the second letter of offer, the plaintiff granted the first defendant

the second BBA facility for the purpose of settling the first BBA which was already in default. The first defendant and the plaintiff had executed the following documents:

(a) the various APAs and ASAs dated 24 September 2009 whereby the first defendant had agreed to sell to the plaintiff asset up to the value of RM48.5m which would subsequently be repurchased by the plaintiff at the purchase price of RM64.350m. The value of the asset for each APA transaction was for RM12.125m and the value of the asset for each ASA transaction was RM16,087,500 respectively (see pp 23–27 and 28–33 of document B1);

(b) the APAs and the ASAs were premised on the *Bai' Al-Inah* concept;

(c) the underlying asset for the purpose of the APAs and ASAs would be the same 16 million shares owned by DW1 in the first defendant which were conveyed by DW1 to the first defendant by way of *hibah* and re-conveyed by the first defendant to DW1 after the execution of the ASA also by way of *hibah* (see p 34 of document B1);

(d) the payment of the purchase price would be by way of a deferred and progressive monthly repayment effective from 30 April 2009;

(e) alternatively, in the event the first defendant was able to raise proceeds from the private placement exercise and/or the rights issue exercise to be carried out by the first defendant, the repayment shall be from these proceeds (see pp 1–21 of document B1);

(f) the mode and manner in which the APAs and the ASAs were to be executed were in the same manner as the first BBA, including the transfer of the asset of DW1 in the first defendant by way of *hibah*. In a nutshell the whole process which were executed under the first BBAs were repeated for these transactions herein giving the impression that the RM48.5m assets were dealt with by the first defendant and the plaintiff in order to repay the first BBA facility. The APAs and ASAs executed by the plaintiff and the first defendant are now identified as the second BBAs (see pp 1–21 of document B1); and

(g) the same 16 million shares which were re-conveyed to DW1 by the first defendant were subsequently pledged by DW1 as security for the second BBAs by way of second MOD (see pp 94–114 of document B1).

[57] DW1 did not understand the whole process but merely left everything in the hands of the plaintiff. There were threats, duress and representations made by the plaintiff, which compelled the first defendant to execute the second BBA and DW1 to execute MOD 2 as security for the second BBA. In fact, DW1's fear and concern which were raised in the first BBA were also raised before the execution of the second BBA transaction. However, after having

been given the assurances by the plaintiff that his liability under the second BBA would be limited only to the value of the 16 million shares and any shortfall was to be claimed from the first defendant, DW1 agreed to execute the MOD 2. Further, there were also assurances given by CIMB Investment that the rights issue exercise would be completed and the first defendant's indebtedness would be resolved. Based on the duress, threats and the assurances by the plaintiff, DW1 executed the MOD 2 and the first defendant's executed the second BBA without fully understood the effect of their acts.

[58] Due to the financial crisis faced by the first defendant and its subsidiaries in its and/or their business ventures and businesses in the Middle East the employers were not settling the certified works which were completed by the first defendant's subsidiaries. This had resulted in the non-payment of the sums due under the second BBA. Hence, the first defendant and its subsidiaries were facing cash flow problem. At the material times, the rights issue exercise to be undertaken by the first defendant under the advice of CIMB Investment was no longer feasible as there was already cause of concerns that the ventures and projects undertaken by the first defendant would be aborted or delayed. An announcement was made by the first defendant around August 2009 that the rights issue exercise was to be aborted. By the end of 2009, the first defendant and its subsidiaries were facing acute financial crisis as there were no payment from the Middle East employers for the services already provided by the first defendant or its subsidiaries. The employers refused to pay the first defendant and/or its subsidiaries and/or were incapable of settling quite a substantial amount under the ventures and/or projects entered into between them. As a result of this the first defendant was not able to meet with its obligations under the second BBA.

[59] DW1 was making efforts to secure a white knight to inject the capital to save the situation faced by the first defendant and its subsidiaries for the Middle East ventures and/or businesses. Before DW1 could complete this exercise and despite DW1's plea, the plaintiff decided to recall the second BBA and proceeded to dispose the 16 million shares pledged under the MOD 2. Through that exercise the plaintiff managed to secure the sum of RM3,666,822.80 leaving a sum of RM54,442,744.08 due and outstanding (see pp 264–268 of document B1)

[60] The plaintiff had failed to appreciate the effects of its action in disposing DW1's shares in the first defendant. Its acts had caused a market panic as a very high ranking officer of a public listed company such as the DW1 was no longer a shareholder. This had caused other bankers to recall all facilities granted to the first defendant and/or its subsidiaries causing the first defendant to collapse and subsequently delisted from the Bursa Malaysia Bhd.

[61] Despite the fact DW1 was informed by the plaintiff that his liability under the MOD 2 was only up to the limit of the value of the 16 million shares he had pledged for the second BBA when the notice of demand was received, DW1 discovered that the plaintiff had claimed the entire indebtedness of the first defendant. When DW1 queried the plaintiff over this issue, he was directed to cl 6 of the MOD 2, which purportedly provided an indemnity for DW1 to settle the entire amount outstanding minus the value of the 16 million shares, which were disposed of by the plaintiff. DW1 was shocked as it was not the intention of the parties to the second BBA for DW1 to be liable for the entire outstanding sum under the said facility. DW1 believed that the plaintiff had surreptitiously inserted cl 6 of the MOD 2 without DW1's knowledge. As far as DW1 could remember, he was only directed to cl 8 of the MOD 2 which clearly provided that his liability was only up to the value of the 16 million shares and nothing more.

[62] DW1 alleged that the second BBA were tainted with illegality as these transactions were not in conformity with the Shariah principle of financing and were in contravention with the provision of s 67 and s 67A of the Companies Act 1965. These transactions were a mere sham and were carried out to disburse the funds to the first defendant despite the fact that there was no actual and legal sale and purchase of the assets as envisaged in a BBA premised on the Shariah principle of financing. The same applied to the transactions surrounding the first BBA. Both these transactions used the same asset which were recycled and to create the impression that the total value of the 16 million shares were worth more than RM50m. In view of what had been stated above, DW1 claimed that he was not liable to settle the entire sum under the second BBA. Therefore, the plaintiff ought to pay damages to DW1 for the loss suffered by DW1 as a result of the plaintiff's surreptitious insertion of cl 6 in the MOD 2. Further as the execution of the first and second BBAs were tainted with duress, threat and misrepresentation the first defendant and DW1 were coerced into entering these two transactions.

THE POINTS RAISED IN SUBMISSIONS

For the plaintiff

[63] Learned counsel for the plaintiff had raised, amongst others, the following arguments:

(a) the plaintiff's case against the second defendant was premised on MOD 2 (see pp 94–114 of document B1). Pursuant to cl 2.1 of MOD 2, the second defendant had agreed to be responsible for the 'indebtedness' and the 'sale price' payable by the first defendant to the plaintiff. The 'sale price' was RM16,087,500 x 4 (RM64,500,000) (see section 10 of Appendix 1 (at pp 31, 44, 57, and 70 of document B1);

(b) cl 6.1 of MOD 2 provided for obligations of parties in event of default whereby the plaintiff was given an absolute discretion to realise, sell or dispose of the securities or part thereof to settle the amount of indebtedness incurred by the first defendant. In the event there was any deficiency after the sale of the assets, the second defendant had agreed to make good and pay on demand to the plaintiff such deficiency. The second defendant irrevocably and unconditionally agreed with the plaintiff to commence the action against the second defendant separately or simultaneously against the first defendant and/or the second defendant without having exhausted the plaintiff's rights to sell or proceed against the securities;

(c) cl 23.1 of MOD 2 reinforced the terms that the liability of the second defendant was to pay the whole of the indebtedness of the first defendant to the plaintiff and/or to pay the bank's selling price;

(d) the financing documents were done in accordance with the rulings of SAC-BNM and the current market practice and properly executed. These transactions were not fictitious and/or sham transactions. The first and second defendants did not and could not have had the common intention to enter into a sham transaction. The transactions entered into were in accordance and in line with the Shariah principle of financing premised on the *Al Bainah* principle of financing. In adopting this principle of financing parties had adhered to the guidelines and SAC-BNM resolutions. Hence, the transactions entered into were legal and complied with all requirements set under the *Al Bainah* concept of financing;

(e) as the value of the shares did not match the Facility amount within the allowable range, the documentation for the facility was done in four tranches or four sets of transactions in accordance with the current customary practice. The parties had entered into four BBA contracts, in that, four different transactions to complete the financing. Under this scheme, DW1 had made a *hibah* of his own shares in the first defendant, 16 million units to the first defendant;

(f) upon receiving the shares the first defendant entered into an asset purchase agreement (see pp 23–27 of document B1) where the first defendant sold the 16 million shares ('underlying assets') to the plaintiff at RM12,125,000 being the plaintiff's purchase price. Thereafter the plaintiff and the first defendant had entered into asset sale agreement (see pp 28–33 of document B1) whereby the plaintiff sold the underlying assets at the plaintiff's selling price of RM16,087,500 on deferred payment basis. The first plaintiff then made a *hibah* back of the underlying assets to the second defendant. With this, the first BBA transaction was completed and the underlying assets were transferred back to the original owner, the second defendant herein. The same

process was repeated three more times in sequence of letter of *hibah* (1), the APA, ASA and letter of *hibah* 2 making the total amount under the financing RM64,350,000. The whole process, the mode and the underlying assets were in compliance with the accepted principle of financing premised on the Islamic financing. Each transaction consisted of two separate agreements and there was also no condition stipulated in the APA to repurchase the assets. The contracts had been concluded one after the other and the sequence was correct, firstly the APA and then the ASA. In short, all procedures and protocol involving the *Al Bainah* concept of financing had been followed rigidly;

(g) the serious allegation of deception on the part of the plaintiff, in that, it had surreptitiously inserted cl 6 in MOD 2 without DW1's knowledge, was baseless and ought not to have been made at all as there was clear evidence adduced during the trial that DW1 had executed the MOD 2 voluntarily and after having read and understood the clear words of the security document. DW1 had contradicted himself in his O 14 affidavits and his 'WS-DW1';

(h) the BBA transactions had been approved by the High Court, Court of Appeal and the Federal Court from time of the inception of the financing premised on the *Shariah* principle in Malaysia around the 1990s till this date in numerous cases. The courts had held and approved that '*The concept of Al Bai Bithaman Ajil involves, as pre-requisites, the purchase of the said property by the defendant from the plaintiff and the immediate re-sale of the same property to the plaintiff*' (cases highlighted could be seen in the plaintiffs submission at pp 37–57 (document marked as 1B)). The execution of the property purchase agreement and the property sale agreement constituted part of the process required by Islamic banking procedure before a party can avail itself of the financial facilities provided by the financing institutions;

(i) the transactions were above board and made with the full knowledge of the defendants. The knowledge is evidenced by the first defendant's acceptance of the letter of offer containing all the salient terms. The parties to the transactions were at idem in treating the sale price at RM64,500,000 (16,087,500 x 4) as stated in the ASA at section 10 of Appendix 1 (pp 31, 44, 57 and 70 of document 'B1'). This was also in accord with the intention of the parties, which the second defendant could not dispute at this stage;

(j) it is settled law that a party who had signed a document is bound by the terms and language of the document unless that party could show that there were elements of fraud, duress or misrepresentations involved (see *L'Estrange v F Graucob Ltd* [1934] 2 KB 394; *Wan Salimah bte Wan Jaafar v Mahmood bin Omar (Anim bte Abdul Aziz, intervener)* [1998] 5 MLJ 162);

(k) the quantum of the second defendant's liability was set out in the statement of account produced by the plaintiff (see p 115 of document B1). The High Court had granted judgment in favour of the plaintiff in respect of an O 14 application filed by the plaintiff against the defendants. A well written judgment was written by the learned High Court judge hearing the O 14 application (see *CIMB Islamic Bank Bhd v LCL Corp Bhd & Anor* [2012] 3 MLJ 869). This judgment was confirmed by the Court of Appeal. Upon further appeal to the Federal Court, the second defendant had raised a point of law based on ss 67 and 67A of the Companies Act 1965 whereby the second defendant had argued that the MOD 2 was tainted with illegality and therefore void. This issue was not raised in the O 14 application before the High Court. The Federal Court took the view that this was a triable issue that ought to go for trial. The Federal Court did not disturb the findings of the High Court as well as the Court of Appeal on other issues raised. In view of this the reasoning given by High Court in the O 14 application, which was affirmed by the Court of Appeal and undisturbed by the Federal Court still remains. Therefore, this court ought to take cognisance of this in determining the issues at hand;

(l) the second defendant executed the MOD 2 pledging the 16 million shares which were reverted to his ownership after the fourth BBA was executed as the security for the whole sum involve. All transactions involved, the MOD 2 included, were all done properly and in accordance with the requirements of Shariah and current business practice.

(m) the argument raised by the second defendant that the contract entered into had infringed ss 67 and 67A of the Companies Act 1965 was baseless. The main thrust of s 67 of the Companies Act 1965 was the providing of financial assistance by the company, in this case, the first defendant to a person for the purchase of its own shares. This section also prohibit the plaintiff from purchasing, dealing in or lending money on its own shares. The transactions in the case at hand did not involve provision of financial assistance by the company to anyone to purchase its own shares or the sale by the company of its own shares in the usual term, selling its shares by issuance new shares for cash;

(n) in the current case the first defendant received a *hibah* of its shares owned by DW1, its director and utilised the shares as underlying assets for the BBA transactions. In this case, the shares were transferred to the first defendant by way of *hibah* to the first defendant. The second defendant did not sell his shares to the first defendant. The shares were transferred by way of *hibah* to the first defendant to facilitate the first defendant obtaining the Islamic based financing from the first defendant. The process illustrated above did not show that they were sale

of shares per se with the transfer forms, registration etc as envisaged by ss 67 or 67A of the Companies Act 1965;

(o) the evidence adduced by the second defendant on various matters alleged to have done or omitted to be done by CIMB Bhd and CIMB Investment were not relevant for the purpose of the dispute between the plaintiff and the second defendant as these two entities are separate and distinct entities in law. These two entities were not brought as parties to this proceeding and they were before this court to answer to all allegations levelled against them by the second defendant;

(p) the second defendant's contention that the plaintiff together with CIMB Bank Bhd and CIMB Investment had unreasonably demanded the use of the 16 million shares belonging to the second defendant as the underlying asset for the four sets of APAs and ASAs and pledging these assets as security were baseless and unsupported by any credible evidence. The details of the terms and conditions under the second BBA and first BBA were stated in the letter of offer dated 17 April 2009 and 31 July 2008 respectively. The said letters of offer were considered, deliberated and resolved by the board of directors ('BOD') of the first defendant to which the second defendant was one of the members. The acceptance column to the letters of offer were executed by the second defendant on behalf of the first defendant. In view of this, there was no basis for the second defendant to claim otherwise;

(q) the second defendant's contention that he did not understand the nature, scheme and spirit of the BBAs is devoid of any merit as the second BBA was the second transaction executed by the first defendant within the space of seven months from the first BBA. It had the benefit of time and benefit of seeking legal advice if he had wanted to. Further, the second transaction was deliberated, considered and approved by the BOD of the first defendant comprising of eminent, highly respectable and knowledgeable persons;

(r) the second defendant's contention that there were elements of threat, duress and misrepresentation could not be true. If that was the contention why did the first and second defendants willingly enter into the second BBA and MOD 2. The first defendant was a listed company with strong board of directors. How could these people be put under duress, threat and/or be persuaded by the plaintiff's misrepresentations;

(s) the claim by the second defendant that the sale of the 16 million shares in the first defendant by the plaintiff had caused the first defendant to collapse could not be true as evidence had been adduced that the second defendant had disposed of 25 million-odd shares in the first defendant before the plaintiff dispose of the 16 million shares pledged by the second defendant in favour of the plaintiff;

(t) the first defendant's contention that it had wanted to secure a white knight to save the situation could not be true as there was no evidence adduced during the trial that the first defendant was moving towards that direction;

(u) the allegation of the second defendant that the sale of the 16 million shares had caused a market panic was not supported by credible evidence. On the contrary, there was evidence to show that the second defendant had disposed of 25 milllion of his shares in the first defendant before the plaintiff decided to exercise its rights under MOD 2. If he had not sold, his 25 milllion shares he would still be the major shareholder in the first defendant. This would enable him to be a very high ranking officer in the first defendant;

(v) the claim by the second defendant that the transactions had infringed ss 67 and 67A of the Companies Act 1965 could not hold water. Section 67 prohibits the company whether directly or indirectly or whether by means of guarantee or the provision of security, any financial assistance to deal with the company's own shares. The transactions in this case did not fall within the ambit of 'dealing' envisage by s 67 of the Companies Act 1965; and

(w) s 67A(1) provides for a company to purchase its own shares if the same is authorised by its articles and memorandum. Under this section, the company was authorised to use its own funds to purchase its own shares. These shares might be cancelled or retained by it as treasury shares. This is not the same as the transactions entered into under the second BBA. The transactions under the second BBA was pursuant to a recognised and acceptable structure under the Islamic principle of financing premised on a BBA. The shares would not be retained by the first defendant but would be given back by way of *hibah* to the second defendant. Therefore the issue of retaining the shares as treasury shares or selling them under s 67A(3A) or (3B) did not arise at all.

For the defendant

[64] Learned counsel for the second defendant submitted the following arguments:

(a) the BBA transactions used by the plaintiff were not Shariah compliant. It is trite for the BBA to be valid under the BBA principle of financing the asset to be used in the APAs and the ASAs must be owned by the contracting parties. The shares of a company is neither an asset nor a liability of the company but in fact it represents the company. It is a form of an investment of the investors of the company, which confers proprietary rights on investors. The first defendant being a company is incapable of owning and dealing with its own shares. If a party does not

legally own the asset, it would not be possible that the legal and beneficial ownership of an asset be passed by the contracting party to the Islamic Bank. The monies that were paid by the plaintiff to the defendant purportedly pursuant to the APAs and the ASAs was for non-existence subject matter. Therefore the APAs and the ASAs executed by the plaintiff and the first defendant were invalid or void for want of consideration;

(b) the court has a duty to uphold the BBA transactions unless there were vitiating factors, which would render such contracts to be unenforceable in law, such as fraud, coercion, undue influence, misrepresentation and illegality;

(c) the BBA transactions entered into by the first defendant and the plaintiff were illegal. The BBA facility is merely an asset sale and purchase transaction simpliciter between two contracting parties whereby one party to the transaction will sell an asset to an Islamic Bank at an agreed price and thereafter the Islamic Bank would immediately re-sell the asset to the other party at a higher price;

(d) the validity of each of the asset sale and purchase agreement is to be governed by the Contracts Act 1950. The agreements entered into between the first defendant and the plaintiff must be considered separately and in isolation in order to determine the validity. Pursuant to the APAs between the plaintiff and the defendant dated 24 April 2009 the first defendant sold its shares to the plaintiff at a purchase price of RM12,125,000. Upon execution of these agreements, all rights, title and benefits of the first defendant shall be deemed and passed from the first defendant to the plaintiff. The APAs entered into between the plaintiff and the first defendant contravened s 67(1) of the Companies Act 1965 because the first defendant had dealt with its own shares. Since the transactions were prohibited by s 67(1) of the Companies Act 1965, the legal (in rem) and beneficial (in personam) ownership of the first defendant's shares would not have passed by the first defendant to the plaintiff;

(e) Pursuant to the APAs, the first defendant would be utilising its own assets and funds to facilitate the payment of its shares from the plaintiff. This obviously would infringed s 67(1) and (2) of the Companies Act 1965;

(f) Under s 67A of the Companies Act 1965 the first defendant, being a public listed company is only permitted to deal and purchase with its own shares provided that at the time of the purchase of the shares the company is solvent and remains solvent upon making such a purchase of shares. Further, the purchase of the shares must be made through the

stock exchange and in accordance with the rules of the stock exchange. There must also be element of good faith having the interest of the company in mind;

(g) The four ASAs dated 24 April 2009 was a 'private arrangement' whereby the shares in the first defendant were disposed by the plaintiff to the first defendant. This arrangement had clearly breached s 67A(2)(b) of the Companies Act 1965 as this transaction was not regulated by the Bursa Malaysia. Hence, these transactions were ex facie illegal. Therefore, the ASAs were void and unenforceable. The first defendant were not entitled to reconvey these shares to the second defendant by way of letter of *hibah*. Under s 67A(3B) of the Companies Act 1965, the first defendant is permitted to either cancel the shares that were purchased or retain these shares as a treasury shares. In the event these shares are retained as treasury shares under s 67A(3B) of the Companies Act 1965, the first defendant could distribute the treasury shares as dividends to the shareholders or resell the treasury shares in open market pursuant to stock exchange rules. The act of the first defendant to re-convey the shares to the second defendant by way of *hibah* clearly contravened s 67A of the Companies Act 1965. The provision of s 67(3B) did not permit the first defendant to reconveyed these shares to the second defendant. In this situation, all the transactions performed under the ASAs and the APAs were illegal and void;

(h) as the underlying transactions under the BBA entered into between the plaintiff and the first defendant were illegal, the second defendant's liability to the plaintiff under the MOD 2 had been extinguished;

(i) the series of transactions undertaken by the plaintiff was a sham and was to create an impression that the first defendant and the plaintiff were transacting assets up to the value of RM48.5m when the actual value of the asset was only RM9,440,000. The parties were in fact dealing with the same shares valued at RM9,440,000 for four times and treated as if the total value the assets for the four transactions was RM64,350,000 when in reality the value of these shares was only RM9,440,000. The transactions entered into between the plaintiff and the first defendant was a sham and not in accordance with BNM guidelines on capital and adequacy ratios which must be adhered to by an Islamic Bank. If the APAs and the ASAs were upheld valid, this would jeopardise the rights of the second defendant who had executed MOD 2 and stood as the purported guarantor. As a result of this illegal and sham transactions, the second defendant's liability under MOD 2 is manifestly excessive and inequitable;

(j) the plaintiff's case against the second defendant was, under MOD 2 dated 24 April 2009 whereby the second defendant had agreed to be liable only to the extent of the value of the 16 million shares pledged and

nothing more. The second defendant shall not be liable for the entire indebtedness of the first defendant. If there was any shortfall, it was the first defendant who should be responsible to pay the difference. In so far as the second defendant was concern, in event of default of the BBA facility, the plaintiff shall only be entitled to dispose of the shares pledged to part settle the first defendant indebtedness. Anything beyond that shall be borne by the first defendant;

(k) the letter of offer dated 17 April 2008 seemed silent with regard to the second defendant's liability to pay the plaintiff the entire indebtedness. It was represented to the second defendant by the plaintiff that his liability would only be limited to the value of the 16 million shares pledged. Pursuant to cl 8.4 of MOD 2 it was the first defendant's responsibility to pay the difference between the amount of the indebtedness and the amount realised under MOD 2;

(l) the plaintiff's officers had not directed the second defendant to cl 6.1 of MOD 2 despite the second defendant's queries to the plaintiff with regard to the extent of his liability under MOD 2. It was impressed upon him that his liability would only be limited to the value of the shares pledged and nothing more. In fact, cl 6.1 of MOD 2 was surreptitiously inserted to the detriment of the second defendant;

(m) in view of the contradictions between the clauses in MOD 2 these clauses must be interpreted in favour of the second defendant as the *contra proferentum* rule would apply to the facts at hand. Therefore, the plaintiff must be precluded from enforcing its rights under MOD 2; and

(n) in view of the illegality of the second BBA facility, MOD 2 was unenforceable against the second defendant. The disposal of the shares of the second defendant was unlawful and without justification. Therefore the plaintiff must be liable for the value of the shares which was estimated to be around RM35,520,000.

FINDINGS OF THE COURT

[65] After giving full consideration to the evidence, both documentary as well as testimonial, and the submissions by learned counsel for the respective parties the followings are my findings.

Issue 1

Whether the second defendant has the locus standi to challenge the legality of the second BBA transactions

[66] Firstly, it was undisputed that the first defendant had received the second BBA facility from the plaintiff. It was also not disputed that the second

BBA was secured by, inter alia, MOD 2 executed by the second defendant. However, what is in issue in this case is status and the legality of these transactions from the perspective of the Islamic principle of financing and ss 67 and 67A of the Companies Act 1965.

[67] Before I proceed to deliberate on the issue of the legality of the second BBA transaction, it is pertinent for me to express my view on the issue of law with regard to the status of the second defendant to challenge the legality of the BBA transactions when the summary judgment against the first defendant still remains.

[68] In *Bank Kerjasama Rakyat Malaysia Bhd v Sea Oil Mill (1979) Sdn Bhd & Anor* [2010] 2 MLJ 740; [2010] 1 CLJ 793, the plaintiff had granted the first defendant an Islamic Banking Facility of *Al-Tarkhis* based on *Bai Al Inah* principle. The payment of the facility was guaranteed by the second defendant. The learned judge of the High Court who heard the O 14 application had allowed the plaintiff's application for summary judgment. Dissatisfied with the decision, both defendants appealed to the Court of Appeal against the said decision. By the time the appeal was fixed for hearing at the Court of Appeal, the court was informed that the first defendant was in liquidation since 5 October 2005. No further steps was taken by the first defendant and/or the liquidator to pursue the appeal. Hence the first defendant's appeal was struck out by the Court of Appeal. The judgment of the High Court against the first defendant who was the principal debtor remained valid and in force. The second defendant proceeded with the appeal which was heard and allowed by the Court of Appeal and the matter was reverted to the High Court to be heard on merits. The matter did not stop there. The respondent which was the plaintiff in the court of the first instance, then proceeded to file for leave to appeal to the Federal Court, which was granted by the said court. The substantive appeal was heard and allowed by the Federal Court. In allowing the respondent's substantive appeal His Lordship Hashim Yusoff FCJ had this to say:

> [16] The Court of Appeal in striking out the appeal of the first respondent which was the principal borrower/debtor however allowed the appeal by the second respondent who was the guarantor for the first respondent, on the grounds that the appellant's capacity to give the revolving credit to the first respondent was a serious issue of fact and law that needed to be tried by the calling of witnesses.
>
> [17] With respect, we cannot agree with the reasoning given by the Court of Appeal. Since the first respondent's appeal was struck out it meant that the O 14 summary judgment given by the High Court against the first respondent, still remains. It follows that the second respondent's liability as the guarantor for the first respondent also remains, by virtue of s 81 of the Contracts Act 1950. The suit by the

appellant against the second respondent as the guarantor is therefore valid, following the decision of the Court of Appeal in the case of *Ginlon (M) Sdn Bhd v MBf Finance Bhd*.

[18] The question whether the appellant could carry on Islamic banking or not does not arise. The simple fact is that the first respondent received a large sum of money from the appellant and then defaulted in its repayment. The second respondent was also sued by the appellant based on his guarantee for the said revolving credit. Both the first and second respondents were well aware of their respective contractual responsibilities and liabilities in the event of default of repayment.

[69] In the case at hand, the second defendant, had not executed any personal guarantee agreement in respect of the second BBA granted by the plaintiff. Instead, he did provide the MOD 2 as a continuing security for the payment and satisfaction of the indebtedness under the BBA and/or the selling price to the plaintiff. Clause 2 (see p 98 of document 'B1') of the MOD 2 reads:

2 CREATION OF SECURITY

2.1 In consideration of your agreeing at our request or the request of the Customer to provide, having provided, providing and/or continuing to provide financing facilities or other accommodations from time to time, including granting such financing facilities to us or the Customer pursuant to the General Facility Agreement, *we hereby charge the Securities to you or such agent or nominee as you may in your absolute discretion nominate as a continuing security for the payment and satisfaction ON DEMAND of the Indebtedness and/or the Bank's selling price to you (and irrespective of whether or not the banker customer relationship between you and the Customer and/or us have ceased or been terminated)* including:

(a) in the case of our insolvency and/or the insolvency of the Customer all sums which would have been owing to you by us or the Customer if such liquidation had commenced at the time when you receive actual notice of the presentation of a petition or the passing of a resolution to wind up in the case of a liquidation and notwithstanding such liquidation.

(b) all monies obtained from or liabilities incurred to or by you notwithstanding that the incurring of such liabilities may be invalid or in excess of the powers of the Customer or of any director or attorney, and notwithstanding any other irregularity in incurring such liabilities; and

(c) in the event of the discontinuance by any means of the security hereby created all cheques drafts bills notes and negotiable instruments drawn by or for our account or the account of the Customer or you or your agents and purporting to be dated on or before the date when such discontinuance becomes known to you or your agents although presented to or paid by you after that date and all our liabilities or the liabilities of the Customer to you at such date whether certain or contingent and whether payable forthwith or at some future time or times and also all credits then established by you for us or the Customer. [Emphasis added.]

[70] However, in the same MOD 2, the second defendant had undertaken that if there is any deficiency after the sale of the securities, the plaintiff could proceed against him to make good and pay on demand any such deficiency. This undertaking is entrenched in cl 6 of the MOD 2 (see p 100 of document 'B1'), which reads:

> 6 POWER OF SALE
>
> 6.1 Upon the happening of any Event of Default, you may without any notice to us or the Customer, realise, sell or dispose of the Securities or any part thereof either together or in parcels, to itself or to any otherperson(s) either by dealings at any broker's board or by public or private sale or private treaty or in such other manner for such consideration (whether payable or deliverable immediately or by instalments) as you may think fit without being in any way responsible for any loss occasioned thereby howsoever arising. In the event of any such sale if less than all of the Securities subject hereto are to be sold or disposed of you may in your absolute discretion select which Securities subject hereto are to be sold or disposed of. *In the event of any deficiency after the sale of the Securities subject hereto whatsoever and howsoever arising we agree to make sood and pay on demand to you such deficiency PROVIDED THAT nothing herein contained shall be construed as imposing any obligation (whether at law or in equity) upon you to exhaust your remedy to sell the Securities or any part thereof before commencing any separate action or before enforcing any other remedies or exercising any other rights against us or the Customer AND we hereby irrevocably and unconditionally agree with and consent to you commencing separate proceedings, enforcing other remedies and exercising any other rights which you may have against us or the Customer simultaneously with and without having exhausted you rights to sell or to proceed against the Securities*. (Emphasis added.)

[71] The next question to be asked is whether cl 6 of the MOD 2 tantamount to a contract of guarantee?

[72] A contract of guarantee is defined by s 79 of the Contracts Act 1950 as follows:

> A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety', the person in respect of which default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written.

[73] Based on the above said definition, this court has to examine whether the above cited provision is a form of guarantee recognised under s 79 of the Contracts Act 1950.

[74] In construing cl 6 of the MOD 2, due regard must be given to the MOD as a whole, its language and any other admissible evidence to determine its true nature and purport. The court should not be bound by the label affixed onto that particular document (see *Tan Chong And Sons Motor Co Ltd v Yang Chin Lang* [1967] 1 MLJ 123, *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141; [1996] 3 CLJ 26 (CA) and *The Pacific Bank Bhd v Vimla Textiles & Ors* [2004] MLJU 197; [2004] 6 CLJ 406 (HC)).

[75] Reverting to the case at hand, it is expressly clear that the MOD 2 was executed by the second defendant as a continuing security for the payment and satisfaction of the first defendant's indebtedness and/or the selling price to the plaintiff (see cl 2.1) on demand. For that, there are two remedies available to the plaintiff. Firstly, to sell the securities and secondly to demand from the second defendant individually if there is any deficiency after the sale of the securities (see cl 6). These rights of the plaintiff shall not cease until satisfied by the first defendant and/or the second defendant. This is provided under cl 16.1 of the MOD 2 (see p 104 of document B1), which reads:

> Without prejudice to any other remedy which you may have you shall at any time have the right to consolidate any or all of our account or accounts with you with any of our liabilities and/or the liabilities of the customer under any other agreement or contract with you and set-off or transfer any sum or sums standing to the credit of any one or more of such accounts agreement or contracts in or towards the satisfaction of any of our liabilities and/or the liabilities of the customer hereunder. Such right shall be exercised at your absolute discretion and *it is hereby expressly agreed and declared that unless you otherwise agree, our obligations under this memorandum of deposit shall not be satisfied except on payment by us and/or the customer of not only all the Indebtedness and/or the Bank's selling price secured hereby but also all monies secured by any other charge or security created by us and/or the customer or any person through whom we claim in favour of or vested in you*. (Emphasis added).

[76] Therefore, the MOD 2 was not only a charge but it also provides a personal guarantee by the second defendant by virtue of cl 6 of the said document. On that premise alone and in the light of decision in *Bank Kerjasama Rakyat Malaysia Bhd v Sea Oil Mill (1979) Sdn Bhd & Anor*, the second defendant was not in a position to question the legality of the BBA transaction entered into by the plaintiff and the first defendant as long as the O 14 judgment remains valid.

[77] This point was had been illustrated by His Lordship Abdul Aziz Mohamad JCA (as he then was) in *Ginlon (M) Sdn Bhd v MBF Finance Bhd* [2004] 2 MLJ 641 where His Lordship stated:

> Section 79 of the Act provides, in its first part, as follows:

> A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety': ...
>
> For there to be surety, therefore, there must be a contract of guarantee, in which the surety undertakes to perform the promise, or discharge the liability, of a third person in case of the third person's default. It is statutorily a three-party situation, although the third party is not a party to a contract of guarantee. Section 81 provides: 'The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract'. that is the contract of guarantee. The remedy of the person to whom the guarantee is given is therefore to sue the surety on his undertaking in the contract of guarantee if the third person defaults. The remedy is against the person of the surety.

[78] Based on the aforesaid, the second defendant had no locus to challenge the legality of the transactions entered into between the plaintiff and the first defendant. Even if I was wrong in my approach in holding that the second defendant had no locus to question the legality of the second BBA transaction, for completeness, I will proceed to deal with other issues raised by the respective parties.

Issue 2

Whether the asset purchase agreements, asset sale agreements and the letters of hibah were in conformity with the Shariah principle of financing and legally binding

[79] The arrangement undertaken by the parties to the second BBA was peculiar, firstly it involved the same asset of 16 million worth RM9.44m which was 'recycled' three more times with the total value being RM48.5m in respect of the purchase price for the four APAs and RM16,087,500 and 'recycled' three more times with a total value of RM64.5m in respect of the sale price of the four ASAs.

[80] The second defendant claimed that the mechanics employed by the plaintiff was a sham arrangement and non Shariah compliant. Therefore, the second defendant alleged that these transactions were illegal, void and unenforceable. According to the second defendant, the series of transactions undertaken by the plaintiff was to create the false impression that the parties were in fact transacting assets up to the value of RM48.5m in order to merely facilitate the purported disbursement of funds. The second defendant contended that in reality the plaintiff and the first defendant were dealing with the same asset and upon the completion of the four transactions would provide a grossly undervalued security of RM9.44m.

[81] This main issue which was puzzling me from the outset, whilst the case

A was proceeding and even at the stage of submissions was whether this arrangement was possible, legal and acceptable within the Shariah financing framework.

B **[82]** I have the second defendant on the one hand, despite having benefitted from these transactions, who contended that the same was a sham, unacceptable and against the principle of Islamic financing. On the other hand, I have the plaintiff which defended that its actions were in compliance with the Islamic principle of financing premised on the *bai' inah* contract. The plaintiff claimed that it has satisfied all the requirements of a valid *bai' inah* transactions.
C Hence, the plaintiff claimed that these transactions were recognised, acceptable, valid and enforceable.

D **[83]** There was no direct authority on point, which had been decided by our courts or courts of similar jurisdictions. Therefore, I viewed this a good case of referral to the Shariah Advisory Council of Bank Negara Malaysia ('the SAC') for the said SAC's ruling as provided under s 56(1)(b) of the Central Bank Act 2009. As there is already a legal structure established by the Central Bank Act 2009 to ensure the banking business in Malaysia is regulated within the
E boundaries and/or ambit approved by the Religion of Islam, this matter was referred to the SAC on 11 November 2013 for its views and/or ruling from the Islamic perspective (see *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839 (CA)).

F **[84]** It is pertinent at this juncture to understand the real concept of BBA that is applicable to the factual matrix of this case.

[85] Generally, BBA is a deferred payment sale contract. With this general term in nature, it can be implicated in any type of sale except *salam* because in
G *salam* the price must be fully paid in advance on spot basis. *Bai' inah* that was adopted in this case is an example of such sale.

[86] *Bai'inah* refers to an arrangement which involves sale and buy back transactions of an asset by the seller. Under this contract, the seller sells an asset
H to the buyer on cash basis and then buys back the asset at a deferred price, which is higher than the cash sale price. Following the Shafi'i School of Thoughts, the Shariah Advisory Council of the Central Bank Malaysia had officially endorsed the practice of *bai'inah*.

I **[87]** Whilst the basic, spirit and mechanics of the BBA/*bai' inah* contracts were clearly illustrated in a number of cases, the facts of the case at hand were a little bit peculiar as illustrated in the preceding paragraphs. With the concurrence of both learned counsel who were handling the trial at the material times, four Shariah issues were framed and referred to the SAC as follows:

(a) Aset dan Cara Pembiayaan

beberapa *hibah*, beberapa PPA dan beberapa PSA yang dilaksanakan pada tarikh yang sama bagi tujuan pembiayaan keseluruhan nilai melebihi nilai sebenar Aset tersebut.

(b) hibah dan Cagaran

Sama ada Aset yang terlibat dalam empat (4) *hibah* di bawah prinsip Al Inah di atas boleh dihibahkan semula kepada pemunya asal dan digunakan sebagai cagaran bagi menjamin pembayaran pembiayaan di atas yang bernilai empat (4) kali ganda melebihi nilai asal asset tersebut.

(c) hilah

Apakah hilah yang boleh membatalkan sesuatu transaksi daripada perspektif hukum Syarak?

(d) Kesan Transaksi

Sekiranya transaksi dalam ilustrasi di atas tidak sah dari segi Shariah, apakah obligasi pihak-pihak daripada perspektif Shariah berhubung keempat-empat pembiayaan tersebut dan sama ada ianya turut memberi apa-apa kesan ke atas cagaran yang menjamin pembiayaan tersebut.

(All the relevant documents pertaining to the transactions were also submitted to the SAC for its perusal)

[88] The four *Shariah* issues that were referred to the SAC for its ruling were discussed and deliberated in SAC's 141st meeting held on 26 November 2013. For ease of reference, the same are being reproduced below as follows:

A

" **RUJUKAN DI BAWAH SEKSYEN 56(1)(B) AKTA BANK NEGARA MALAYSIA, 2009**
GUAMAN SIVIL NO. : 22A-457-2010
CIMB ISLAMIC BANK BERHAD LWN LCL CORPORATION BERHAD & LOW CHIN MENG

B

Pendahuluan

Dalam menjawab soalan-soalan yang dikemukakan oleh Mahkamah, MPS mengambil ingatan bahawa tugas MPS hanyalah untuk menganalisis isu-isu Syariah yang terkandung di dalam setiap soalan yang dikemukakan dan menyatakan hukum Syarak mengenainya. MPS tidak mempunyai bidangkuasa bagi membuat penemuan fakta (*finding of facts*) atau memakai (*apply*) sesuatu hukum itu kepada fakta kes dan membuat keputusan, sama ada mengenai sesuatu isu atau bagi kes tersebut kerana ia terletak dalam bidang kuasa Mahkamah.

C

D

Persoalan (1): Aset dan cara pembayaran:

Sama ada bagi pembiayaan kewangan berdasarkan prinsip *bai' 'inah*, aset yang sama boleh digunakan beberapa kali melalui beberapa hibah, beberapa PPA dan beberapa PSA yang dilaksanakan pada tarikh yang sama bagi tujuan pembiayaan keseluruhan nilai melebihi nilai sebenar aset tersebut.

E

Jawapan (1)

1. Sesuatu akad *bai' 'inah* yang dilaksanakan hendaklah memenuhi syarat-syarat sah seperti yang berikut:

F

   i) Mempunyai dua kontrak yang jelas dan berasingan, iaitu akad penjualan dan akad penjualan semula;
   ii) Tidak terdapat syarat pembelian semula aset dalam akad;
   iii) Masa bagi pemeteraian setiap akad adalah berbeza;
   iv) Turutan pemeteraian setiap akad adalah betul iaitu akad jual beli pertama hendaklah diselesaikan terlebih dahulu sebelum akad jual beli yang kedua dimeterai; dan

G

   v) Berlaku pemindahan hak milik aset serta wujud penguasaan ke atas aset (*qabd*) yang sah berdasarkan Syarak dan amalan perniagaan semasa (*'urf bijan*).

H

2. Di samping itu, sesuatu transaksi *bai' 'inah* yang dilaksanakan hendaklah memenuhi syarat-syarat sah jual beli yang terpakai kepada semua akad jual beli yang mana antara lain transaksi tersebut mestilah memberi kesan kepada

I

berlakunya pemindahan hak milik aset antara dua pihak yang berkontrak. Selain daripada itu, *ma'qud 'alaih* (*subject matter*) perlulah benar-benar wujud ketika akad berlangsung, boleh dipindahkan hak milik, jelas spesifikasinya dan memberi manfaat seperti mana yang dibenarkan oleh Syarak.

3. MPS berpandangan bahawa sekiranya syarat-syarat sah *bai' 'inah* seperti yang dinyatakan dalam perenggan 1 dan 2 dipatuhi dalam setiap transaksi yang dilaksanakan, maka sesuatu transaksi *bai' 'inah* yang dilaksanakan adalah sah walaupun transaksi tersebut berlangsung secara berulang kali pada tarikh yang sama dengan menggunakan aset yang sama tetapi dalam masa yang berlainan di mana kontrak yang kedua berlaku selepas kontrak yang pertama dan seterusnya. Memandangkan transaksi *bai' 'inah* boleh berlaku secara berulang kali, maka isu nilai keseluruhan pembiayaan melebihi nilai sebenar aset pendasar tidak timbul.

4. Di samping itu, secara umumnya, aset jual beli harus diurusniaga pada apa-apa harga asalkan ianya dipersetujui oleh pihak berkontrak. Ini adalah berdasarkan kepada hujah-hujah berikut:

1) Dalil al-Quran: Surah al-Nisa': ayat 29

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُواْ لَا تَأۡكُلُوٓاْ أَمۡوَٰلَكُم بَيۡنَكُم بِٱلۡبَٰطِلِ إِلَّآ أَن تَكُونَ تِجَٰرَةً عَن تَرَاضٖ مِّنكُمۡۚ وَلَا تَقۡتُلُوٓاْ أَنفُسَكُمۡۚ إِنَّ ٱللَّهَ كَانَ بِكُمۡ رَحِيمٗا

"Wahai orang yang beriman, janganlah kamu makan harta-harta sesama kamu dengan jalan salah, kecuali ***dengan jalan perniagaan yang dilakukan secara suka sama suka di antaramu****, dan janganlah kamu berbunuh-bunuhan sesama sendiri. Sesungguhnya Allah sentiasa Mengasihi kamu".*

2) Hadis-Hadis Rasulullah s.a.w:

لا يحل مال امرئ مسلم إلا بطيب نفس منه[1]

"Tidak halal harta yang dimiliki oleh seseorang Muslim (untuk diambil oleh orang lain) kecuali diizinkan olehnya".

إنما البيع عن تراض[2]

"Jual beli adalah berdasarkan persetujuan bersama"

[1] Al-Baihaqi, Al-Sunan al-Kubra, Dar al-Kutub al-'Ilmiyyah, (2003), j. 6, h. 166. Hadis no. 11545
[2] Raid Ibn Sobri, Syuruh Sunan Ibn Majah, Bait al-Afkar al-Dauliyah, (2007), j. 1, h. 848, hadis no. 2185

A

3) Kaedah fikah:

الأصل رضى المتعاقدين ونتيجته هي ما التزماه بالتعاقد[3]

B

"Hukum asal dalam akad adalah redha atau persetujuan kedua-dua pihak yang berkontrak dan kesan kontrak adalah berdasarkan (hak dan tanggungjawab) yang telah mereka persetujui dalam akad"

Persoalan (2): Hibah dan cagaran

C

Sama ada aset yang terlibat dalam empat (4) hibah di bawah prinsip *bai' 'inah* di atas boleh dihibahkan semula kepada pemunya asal dan digunakan sebagai cagaran bagi menjamin pembayaran pembiayaan di atas yang mana nilainya empat (4) kali ganda melebihi nilai asal aset tersebut.

D

Jawapan (2)

E

1. Bagi menjawab soalan ini, MPS membuat penelitian terhadap dua perkara yang menjadi asas persoalan iaitu hukum berkaitan hibah, dan hukum berkaitan *rahn* (gadaian atau cagaran).

Hukum Berkaitan Hibah

F

2. Hibah adalah kontrak satu pihak (*unilateral*) untuk memindahkan pemilikan sesuatu aset kepada orang lain tanpa sebarang balasan atau tukaran semasa hayat pemberi hibah, dan merupakan suatu amal kebajikan.[4]

3. Elemen-elemen (rukun) hibah adalah seperti berikut:[5]

G

i) Pemberi hibah (*al-wahib*);
ii) Penerima hibah (*al-mawhub lahu*);
iii) Harta yang dihibahkan (*al-mawhub*); dan
iv) *Ijab* dan *qabul*.

H

[3] Ahmad al-Zarqa', Syarh al-Qawa'id al-Fiqhiyyah, Dar al-Qalam, (1989), h. 482
[4] Wahbah al-Zuhaili, Al-Fiqh al-Islami wa Adillatuhu, (t.t), j 5, h. 3980
[5] Ibnu Juzai, al-Qawanin al-Fiqhiyyah, t.t, h. 241

I

4. Berikut adalah syarat-syarat sah hibah:

4.1. Syarat pemberi hibah adalah seperti berikut:[6]

i) Mestilah pemilik penuh kepada harta yang dihibahkan atau wakil kepada pemilik yang diberikan kuasa untuk melakukan transaksi bagi pihak pemilik;
ii) Mestilah mempunyai kelayakan undang-undang untuk menghibahkan; dan
iii) Mempunyai kuasa penuh untuk menggunakan hartanya tanpa ada sebarang sekatan seperti tindakan insolvensi dan sebagainya.

4.2. Syarat bagi harta yang dihibahkan adalah seperti berikut:[7]

i) Wujud ketika hibah dilaksanakan;
ii) Harta yang diperakui dari sudut Syariah;
iii) Hakmilik pemberi hibah;
iv) Tiada sekatan ke atas harta tersebut seperti cagaran, lien, kaveat dan sebagainya; dan
v) Berlakunya *qabd* (penerimaan) oleh penerima hibah terhadap harta yang dihibahkan sama ada secara hakiki atau konstruktif.

4.3. Bagi syarat *ijab* dan *qabul*, ulamak tidak bersependapat dalam soal sama ada *qabul* merupakan rukun hibah atau sebaliknya. Rukun hibah di sisi mazhab Hanafi dan Syafie adalah meliputi *ijab* dan *qabul* dengan diqiyaskan kepada akad jual beli.[8] Walau bagaimanapun, menurut pandangan sebahagian ulamak Mazhab Hanafi seperti Al-Kasani, *qabul* tidak dianggap sebagai rukun hibah.[9]

5. Berdasarkan keputusan MPS yang sedia ada berkenaan syarat *ijab* dan *qabul* ini, dapat dirumuskan bahawa MPS menerima pandangan sebahagian ulamak yang menetapkan bahawa hanya lafaz *ijab* sahaja yang diperlukan sebagai syarat sah hibah. Keputusan ini adalah berdasarkan kepada asas kontrak hibah adalah kontrak sebelah pihak (*unilateral*) dan juga kesesuaian amalannya dalam konteks semasa.

6. Oleh yang demikian, MPS berpendapat bahawa sekiranya semua rukun dan syarat hibah seperti yang dinyatakan dalam perenggan 3 hingga 5 dipatuhi oleh

[6] Wahbah al-Zuhaili, Al-Fiqh al-Islami wa Adillatuhu, (t.t), j 5, h.3983, 3988, Al-Kasani, Bada'i al- Sana'i fi Tartib al-Syara'i, Dar al-Kutub al-'Ilmiah, (1986), j. 6. h. 118
[7] Al-Kasani, Bada'i al-Sana'i fi Tartib al-Syara'i, Dar al-Kutub al-'Ilmiah, (1986), j. 6. h. 119
[8] Al-Syairazi, Al-Muhazzab fi-Fiqh al-Syafie, Dar-al Kutub al-'Ilmiah, j. 2. h. 334, Wahbah al-Zuhaili, Al-Fiqh al-Islami wa Adillatuhu, (t.t), j 5, h. 3982
[9] Al-Kasani, Bada'i al-Sana'i fi Tartib al-Syara'i, Dar al-Kutub al-'Ilmiah,(1986), j. 6. H. 115

pihak-pihak yang terlibat di dalam hibah, maka sesuatu hibah adalah sah walaupun dilakukan dengan menggunakan aset yang sama secara berulang kali dengan syarat setiap kontrak hibah diselesaikan dengan sempurna terlebih dahulu sebelum memulakan hibah yang berikutnya.

Hukum Berkaitan Rahn (Gadaian Atau Cagaran)

7. Rahn (gadaian atau cagaran) dari sudut Syarak ialah menjadikan sesuatu (aset) sebagai jaminan bagi sesuatu hutang yang boleh digunakan pada masa hadapan untuk melunaskan hutang tersebut jika penghutang gagal melunaskannya pada tarikh yang telah dipersetujui. Aset yang dicagarkan itu hendaklah bernilai dari sudut pandangan Syarak yang boleh membayar hutang keseluruhan atau sebahagiannya.[10]

8. Elemen-elemen (rukun) rahn adalah seperti berikut:[11]

   i) Pihak yang berkontrak iaitu penggadai (*al-rahin*) dan pemegang gadaian (*al-murtahin*);
   ii) Aset gadaian (*al-marhun*);
   iii) Hutang (*al-marhun bih*); dan
   iv) *Ijab* dan *qabul*.

9. Oleh kerana persoalan yang dikemukakan oleh Mahkamah adalah berkenaan aset gadaian, maka MPS hanya akan menumpukan penelitian terhadap isu tersebut sahaja.

10. Aset gadaian (*al-marhun*) adalah aset yang diserahkan oleh penggadai kepada penerima gadaian untuk disimpan atau yang dikenakan sekatan transaksi ke atasnya sebagai cagaran kepada hutangnya. Para ulamak menetapkan beberapa syarat yang perlu dipenuhi untuk menjadikan aset gadaian tersebut sah digunakan sebagai cagaran. Syarat-syarat tersebut adalah seperti berikut:[12]

    i) Aset yang boleh dijual beli. Oleh itu, aset gadaian mestilah memenuhi syarat-syarat yang ditetapkan bagi aset yang boleh dijual beli seperti wujud ketika kontrak dimeterai, bernilai, boleh diserahkan dan merupakan hakmilik sah penggadai atau berada dalam kuasanya;
    ii) Mestilah halal dari segi Syarak untuk melunaskan hutang;
    iii) Mestilah diketahui (maklum); dan
    iv) Hendaklah hak milik penggadai.

[10] Al-Sarakhsi, Al-Mabsut, Dar al-Maghrifah, (1993), j. 21, h. 63, Al-Khatib al-Sharbini, Mughni al-Muhtaj, Dar al-Kutub al-'Ilmiah, (1994), j. 2. h. 121, Wahbah al-Zuhaili, Al-Fiqh al-Islami wa Adillatuhu, (t.t), j 6, h. 4207
[11] Mughni al-Muhtaj, Mughni al-Muhtaj, Dar al-Kutub al-'Ilmiah, (1994), j. 3. h. 38
[12] Al-Kasani, Bada'i al-Sana'i fi Tartib al-Syara'i, Dar al-Kutub al-'Ilmiah, (1986), j. 6. h. 135

11. Selain itu, menurut pandangan sebahagian fuqahak seperti Maliki dan Syafie, adalah harus bagi seseorang itu menggunakan aset pihak ketiga sebagai aset cagaran untuk menjamin hutangnya, tertakluk kepada keizinan pemilik aset tersebut.[13]

12. Hukum asal jual beli bertangguh adalah harus dilaksanakan walaupun tanpa melibatkan sebarang cagaran. Oleh itu, apabila suatu hutang itu melibatkan cagaran, maka tiada halangan dari segi Syarak sekiranya nilai aset yang dicagarkan tersebut melebihi, menyamai, atau kurang daripada nilai hutang.

Persoalan (3): Hilah

Apakah hilah yang boleh membatalkan sesuatu transaksi daripada perspektif hukum Syarak.

Jawapan (3)

Definisi hilah dari sudut istilah Syarak:

1. Definisi hilah dalam mazhab Hanafi: Ibn Nujaym mendefinisikan hilah sebagai kebijaksanaan dalam menguruskan sesuatu perkara iaitu dengan cara menggunakan pertimbangan akal sehingga mendapat jalan (penyelesaian) untuk mencapai sesuatu maksud.[14] Menurut Al-Khassaf, hilah adalah sesuatu yang digunakan oleh seseorang sebagai jalan penyelesaian untuk keluar daripada perkara yang berdosa dan haram kepada yang halal.[15]

2. Definisi hilah dalam mazhab Syafie: Menurut Zakaria al-Ansari, hilah ialah sesuatu yang memalingkan seseorang hamba daripada perkara yang dibencinya kepada perkara yang disukainya.[16]

3. Definisi hilah dalam Mazhab Hanbali: Ibn Taymiyyah mentakrifkan hilah secara umumnya sebagai jalan tersembunyi yang memerlukan kebijaksanaan dan kepandaian bagi mencapai maksud tertentu. Sekiranya maksud tersebut baik, maka ia dikira hilah yang baik, sebaliknya jika maksud tersebut buruk, maka ia adalah hilah yang buruk.[17]

[13] Ibn Rusyd, Bidayah Mujtahid wa Nihayah al-Muqtasid, Dar al-Hadis, (2004), j. 4, h. 55
[14] Ibn Nujaym, al-Ashbah wa al-Naza'ir, Damsyik: Dar al-Fikr, (1983), h. 477.
[15] Al-Khassaf, Fi Al-Hiyal, Kaherah, (1314H), h. 4
[16] Zakaria al-Ansari, al-Hudud al-Aniqah wa al-Ta'rifat al-Daqiqah, Dar al-Fikr al-Mu'asir, (1411H), h. 73
[17] Ibn Taymiyyah, al-Fatawa al-Kubra, Beirut: Dar al-Kutub al-'Ilmiyyah, (1987), j. 6, h. 106

4. Berdasarkan definisi-definisi yang diberikan oleh para fuqahak tersebut, maka secara umumnya hilah boleh dibahagikan kepada dua kategori utama iaitu:[18]

i) **Hilah yang dilarang (*al-hilah al-mazmumah/al-hilah ghayr al-masyru'ah*)**
Sekiranya jalan yang digunakan adalah untuk mencapai tujuan/maksud yang buruk yang bertentangan dengan syarak, sama ada bagi membatalkan hukum syarak atau menukarnya kepada hukum lain seperti meninggalkan apa yang wajib dan membenarkan apa yang haram.

ii) **Hilah yang dibenarkan (*al-hilah al-mahmudah/al-hilah al-masyru'ah*)**
Sekiranya jalan yang digunakan adalah untuk mencapai tujuan/maksud yang baik dan tidak bertentangan dengan syarak, sama ada bagi menegakkan suruhan Allah atau meninggalkan larangannya.

5. Justeru, majoriti fuqahak berpandangan bahawa jika objektif hilah adalah untuk menghalalkan yang haram walaupun menggunakan cara yang dibenarkan maka ianya dikategorikan sebagai hilah yang dilarang. Sebaliknya, jika tujuan hilah dilakukan adalah untuk meninggalkan perkara yang haram dan mencapai sesuatu yang halal, maka ianya dikategorikan sebagai hilah yang dibenarkan.[19]

6. Oleh itu, MPS berpendapat bahawa apa sahaja pelaksanaan hilah yang bertentangan dengan nas Syarak (al-Quran dan Al-Sunnah), maka ia adalah suatu hilah yang dilarang. Manakala pelaksanaan hilah yang tidak bertentangan dengan nas Syarak maka ia merupakan hilah yang dibenarkan dan tidak membatalkan sesuatu transaksi dari perspektif hukum Syarak.

Persoalan (4): Kesan transaksi

Sekiranya transaksi dalam illustrasi di atas tidak sah dari segi Syariah, apakah obligasi pihak-pihak daripada perspektif Syariah berhubung keempat-empat pembiayaan tersebut dan sama ada ianya turut memberi apa-apa kesan ke atas cagaran yang menjamin pembiayaan tersebut.

[18] Dr. Mohamed Fairooz Abdul Khir et al., Parameter Hiyal Dalam Kewangan Islam, (Kertas Kajian No. 23/2011), ISRA, h. 7
[19] Dr. Mohamed Fairooz Abdul Khir et al., Parameter Hiyal Dalam Kewangan Islam, (Kertas Kajian No. 23/2011), ISRA, h. 21

Jawapan (4)

1. Berhubung dengan isu ketaksahan, berdasarkan sudut pandang Syariah, ia boleh berlaku dalam dua (2) keadaan:

   i. Ketidakpatuhan pada rukun yang menyebabkan akad terbatal; dan
   ii. Ketidakpatuhan pada syarat tertentu namun kandungan akad masih boleh diteruskan di mana syarat yang tidak patuh itu akan diketepikan/ digugurkan.

2. Dalam keadaan yang pertama, ia melibatkan kecacatan dalam rukun-rukun sesuatu akad. Akad yang batal tidak memberi kesan-kesan akad yang sah seperti pemindahan pemilikan barang dan sebagainya kerana terdapatnya kecacatan dalam rukun pada sesuatu akad. Oleh yang demikian, akad tersebut tidak memberi kesan dan seolah-olah tidak pernah wujud. Justeru, setiap pihak perlu dikembalikan kepada keadaan asal seperti sebelum kontrak.

3. Bagi keadaan kedua, ia melibatkan pernyataan sesuatu syarat yang tidak sah dari segi Syarak dalam akad yang mana pihak yang meletakkan syarat perlu menggugurkan syarat tersebut. Dalam hal ini, syarat tersebut terbatal dan tidak terpakai, manakala kandungan akad selain daripada syarat yang dibatalkan tersebut masih boleh diteruskan.

4. Oleh itu, MPS berpandangan bahawa jika sesuatu kontrak pembiayaan yang dijalankan adalah tidak sah atau batal, maka ia akan memberi kesan terhadap cagaran yang menjamin pembiayaan tersebut yang mana turut menjadikan cagaran tersebut tidak berkuatkuasa. Ini kerana cagaran adalah kontrak sokongan kepada kontrak utama iaitu jual beli, maka dari segi Syariah, kontrak sokongan akan mengikut sifat kontrak utama dari segi sah dan batalnya ..."

("the SAC Resolution")

[89] Upon reading the SAC resolution it is my understanding that with regard to the issue of the same asset having been repeatedly used for three (3) more similar transactions after the first APA and first ASA were executed, one after the other *bai'inah* contract, the SAC had ruled that once the parties had fulfilled the pre-conditions set out under heading *Jawapan (1) (i)* to *(v)* and there is a transfer of asset from the two contracting parties, the transactions are valid. Other factors to be observed are that the subject matter (*ma'qud'alaih*) must be in existence at the time of the *aqad*, the assets could be transferred, the specifications were clear and must be for the benefit of the purpose permissible by the religion of Islam. Once the parties had complied with the pre-conditions set forth under paras 1 and 2, the *bai'inah* contract is valid and enforceable notwithstanding the fact that the transactions were repeated using the same asset and executed on the same day. As the *bai'inah* contract could be repeated, the SAC ruled that it did not matter if the total value of the transactions exceeded the actual value of the asset used. The APAs and the ASAs must be transacted on the price to be agreed by both parties to the transactions or *'dilakukan secara suka sama suka di antaramu'* as stated in *Quranic Verses, Verse 29 and supported by the words of the Prophet PBUH (see the SAC ruling para 4).*

[90] The SAC had also deliberated on the issue of *hibah* and security (see p 3 of the SAC resolution). On this issue, the problem was whether the asset of the second defendant which was given by way of *hibah* to the first defendant could be given back by way of *hibah* to the original owner, in this case the second defendant, to be used as security to guarantee the payment of the financing of the BBAs especially where the value of the security is four times more than the value of the said asset. On this issue the SAC ruled that *hibah* is a unilateral contract to transfer an asset to another person without any consideration or exchange during the life time of the donor, and a form of charity (see *Wahbah al-Zuhaili, Al Fiqh al-Islami wa Adillatuhu*, (tt),j 5, h 3980). The four elements of *hibah* are the donor (*al-wahib*), the donee (*al-mawhub lahu*), asset to be given as a gift (*hibah*) (*al-mawhub*) and *ijab* and *qabul* (Ibnu Juzai, *al-Qawanin al-Fiqhiyyah*, tt h 241). In order for a *hibah* to be valid, the conditions stipulated under para 4 the SAC resolution must be complied with. Having perused the above quoted resolution and the relevant documentation executed by the first and second defendant, a *hibah* is valid although the same asset is being used repeatedly provided each *hibah* contract is fully executed and/or completed before the donor of the asset embarks into another *hibah*.

[91] The ruling of the SAC pertaining to *Rahn* (charge (*gadaian*)) or (security (*cagaran*)) could be found at paras 7 to 12 of the resolution. In a nutshell the SAC resolved that according to the School of Thoughts of Maliki and Shafie the asset of a third party could be used as a charged asset to guarantee the indebtedness, subject to the consent of the owner (see Ibn Rusyd, *Bidayah Mujtahid wa Nihayah al-Muqtasid, Dar al-Hadis*, (2004), j 4, h 55).

[92] The SAC resolution had also touched on the significance of *hilah*, types of *hilah* and its effects (see *Persoalan* (3): *hilah* at pp 6 and 7 of the resolution). It was the general opinion of all the scholars if the objective of *hilah* is to legalise the illegal notwithstanding the fact the mode used is permissible then this type of *hilah* is categorised as *hilah*, which is forbidden. On the other hand if the purpose of the *hilah* is to leave something which is forbidden and achieve something which is halal or permitted, then this type of *hilah* is categorised as permissible *hilah* (see Dr Mohamed Fairooz Abdul Khir et al, *Parameter Hiyal Dalam Kewangan Islam*, (*Kertas Kajian* No 23/2011) ISRA, h 21).

[93] The last issue of the SAC resolution, touched on the effect of the transactions entered into by the contracting parties. The SAC resolved, firstly, if there is any irregularities in the tenet or *rukun* of an *aqad* in the transactions entered into, the *aqad* had no effect and be treated as if it did not exist. Hence, the position of each party to the contract would have to be reverted to the original position before the contract. Secondly, if it involved a condition which is not legal from the Shariah perspective in the *aqad* and the person who had imposed the condition is required to drop that condition. In this situation, the condition would be cancelled and would not be applicable.

[94] The SAC also resolved that if a financing contract is illegal or void, then this would affect the security which guaranteed the financing and ultimately would render the security ineffective. This is because the security is the supporting contract for the main contract, that is, the sale and purchase. Hence, from the Shariah perspective the supporting document would follow the character of the main contract with regard to its legality or illegality.

[95] On the totality of the evidence before me both testimonial and documentary, I am satisfied and ruled that the transactions that were undertaken by the plaintiff had met with the requisite features of financing premised on the *bai'inah* contract despite the same asset having been used in the four APAs and four ASAs executed by the plaintiff and the first defendant. Hence, there was no room for the second defendant to claim that it was a sham and illegal transactions. Therefore, the transactions entered into ought to be honoured and enforced by this court.

Issue 3

Whether the BBA transactions had infringed ss 67 and 67A of the Companies Act 1965 (Act 125)

[96] Another issue raised by the second defendant to question the legality of the BBA transactions was on the asset transacted between the parties ie 16

million units of the first defendant's own shares ('the assets'). It was alleged by the second defendant that the sale contract between the plaintiff and the first defendant was not valid because under s 67(1) of the Companies Act 1965, the first defendant could not deal with its own shares. Therefore, the legal (in rem) and beneficial (in personam) ownership of the first defendant would not have been passed by the first defendant to the plaintiff. Thus, the entire BBA transactions between the parties, which were sale contracts, are illegal and void for want of consideration.

[97] For this issue, the question now turns upon the application of s 67(1) of the Companies Act 1965 in this case. The provision reads:

> Section 67 Dealing by a company in its own shares, etc:
>
> (1) Except as is otherwise expressly provided by this Act *no company shall give*, whether directly or indirectly and whether by means of a loan, guarantee or the provision of security or otherwise, *any financial assistance for the purpose of* or in connection with *a purchase* or subscription *made or to be made by any person of or for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase, deal in or lend money on its own shares*.

[98] Reverting to the facts at hand, it is expressly clear that the first defendant did not indulge into giving financial assistance to acquire its own shares. Neither had it lent money on the security of its own shares. However, the facts that they entered into four sets of BBA agreements to effect the sale and purchase of the asset, do not in any way give different indication except it is a dealing of the first defendant's own shares. The question is whether the said purported dealing is the one caught by s 67(1) of the Companies Act 1965?

[99] In *Lori (M) Bhd (Interim Receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81 (FC), it was emphasised that s 67 of the Companies Act 1965 was enacted for the protection of the company's funds and the interests of shareholders as well as creditors and public.

[100] Nallini Pathmanathan JC (as she then was) in *Tekital Sdn Bhd v Sarina bt Kamaludin & Ors* [2012] 8 MLJ 734 (HC) had followed a judgment in a Singaporean case ie *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co Ltd and others* [2006] 4 SLR 451 which had underlined the rationale for s 76 of the Singapore Companies Act 1965 which applies equally to our s 67. The relevant passage reads:

> ... Indeed s 76 of the Act was rather more modest in length prior to the numerous amendments that have been effected over a great many years to it. This underscores the basic point that the spirit and intent ofs 76 is not to constitute an impediment to the legitimate trade and commerce that constitutes the

> lifeblood of any and every company. Indeed, the basic thrust of the Act is the precise opposite. To this end, there have been numerous amendments to s 76 precisely in order to ensure that this particular provision does not constitute an impediment to trade and commerce. In other words, this particular provision has been amended meticulously in order to ensure that commercial realities are not only recognised but also given effect to ...
>
> ...
>
> ... In a leading local treatise, it has been 'suggested' that the mischief that the section (viz, s 76 of the Act) is aimed at is the improper depletion of a company's assets to the detriment of its creditors' (see *Walter Woon & Andrew Hicks, the Companies Act of Singapore-An Annotation Vol 1* (LexisNexis, 2004) (Woon & Hicks') at paras 2609-2625).

Again another learned author in this field has recently observed thus (see *Catherine Roberts, Financial Assistance for the Acquisition of Shares* (Oxford University Press, 2005) ('Roberts') at para 1.01):

> This rule against financial assistance for the acquisition of shares has links with a fundamental principle at the core of company law, namely maintenance of capital. The rule can be seen as a method by which a company's capital is maintained for the protection of the company's creditors, and a company's assets are protected against misuse and dissipation by directors and controlling shareholders.

In the judicial context, Arden LJ observed in the recent English Court of Appeal decision of *Shaston v SWP Group Plc* [2003] BCLC 675 (Chaston) thus:

> The general mischief however, remains the same, namely that the resources of the target company and its subsidiaries should not be used directly or indirectly to assist the purchaser financially to make the acquisition. This may prejudice the interests of the creditors of the target or its group and the interests of any shareholders who do not accept the offer to acquire their share to whom the offer is not made.

And, in the English Court of Appeal decision of *In re VGM Holdings Limited* [1942] 1 Ch 235, Lord Greene MR (with whom Luxmorre and Goddard LJJ agreed), referring to the UK predecessor of s 76 of the Act observed thus (at p 239):

> Those whose memories enable them to recall what had been happening after the last war (ie world war two) for several years will remember that a very common form of transaction in connection with companies was one by which persons-call them financiers, speculators, or what you will-finding a company with a substantial cash balance or easily realisable assets such as war loan, bought up the whole or the greater part of the shares of the company for cash and so arranged matters that the purchase money which they then became bound to provide was advanced to them by the company whose shares they were acquiring, either out of its cash balance or by realisation of its liquid investments. That type of transaction was a common one, and it gave rise to great dissatisfaction and, in some cases, great scandals. I think that it is not illegitimate to bear in mind that notorious practice in considering the ambit of the section.

> The passage just quoted is, it is suggested of more than passing significance simply because it gives us the original historical perspective centring on the promulgation of the UK precursor of s 76 of the Act. It is true that the methods of contravening s 76 of the Act have naturally (*and unfortunately)* become more subtle and sophisticated in the intervening period. However, it is equally true that s 76 of the Act was never intended to 'capture' transactions by a company which were entered into bona fide in the commercial interests of the company itself (*as opposed to providing, in substance if not form, financial assistance for the purchase of the company's own shares*). It is this underlying spirit that the above quotation serves to underscore ... (Emphasis added.)

[101] In this instance case, the four sets of BBA agreements executed by the plaintiff and the first defendant were not caught by s 67(1) of the Companies Act 1965. There is no evidence before this court that the purported dealing had improperly depleted the first defendant's assets or prejudiced the shareholders. Furthermore, the letter of offer dated 17 April 2009 clearly says that the BBA facility was to refinance the existing BBA facility of RM48,500,000 (Account No 1404–0000207–40–7) which was intended for Shariah-compliant working capital. Therefore, they were bona fide transactions entered by the first defendant for the commercial interest of the company itself.

[102] How could this purported dealing be said to be captured by s 67(1) of the Companies Act 1965 if the whole BBA transactions were completed only in one day one after the other where to the end, the assets were returned to its original owner ie the second defendant via letter of *hibah* dated 24 April 2009.

[103] Based on the above said premise alone, the BBA transactions entered by the plaintiff and the first defendant are not void and/or illegal.

[104] Even assuming I was wrong in my appreciation of the facts and the law, on the authority of *Co-operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313 (FC) and *Perumahan Wira Seberang Sdn Bhd v Hong Leong Finance Bhd* [1999] 5 MLJ 549 (HC), on the other hand, the plaintiff is not prohibited from enforcing the BBA agreements. This is because no voidness or unenforceability is attached to the facility granted to the first defendant in view of s 67(6) of the Companies Act 1965. Hence, it excludes the application of s 24 of the Contract Act 1950. Edgar Joseph FCJ (as he then was) had this to say in *Lori (M) Bhd (Interim Receiver) v Arab-Malaysian Finance Bhd*:

> In our view, subs (6) of s 67 creates an important exception to s 24 of the Contracts Act by allowing recovery under an illegal contract, thereby excluding the operation of s 24. A good illustration of the application of such a provision is found in the well-known Privy Council case of *Batu Pahat Bank Ltd v Official Assignee of the property of Tan Keng Tin* [1933] AC 691 per Lord Russell at pp 238–239. In our view, the words of Lord Russell would apply equally to s 67 of the Act. See, also,

Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors [1997] 4 MLJ 329 ; [1997] 3 AMR 2718 at p 2757 per Augustine Paul JC, as he then was, which is precisely in point.

[105] It is trite that the law applicable to the Islamic banking facility is the same law applicable to the conventional loan (see *Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd* [2003] 2 MLJ 408; [2003] 1 CLJ 625 and *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839; [2010] 6 CLJ 22). Applying the same principles enunciated in the above said authorities, the BBA transactions in the instant case are enforceable against the defendants regardless its contravention to s 67(1) of the Companies Act 1965.

[106] In disputing the contention on illegality put forth by the second defendant, learned counsel for the plaintiff submitted that even if there is any infringement of s 67 and/or s 67A of the Companies Act 1965, s 55 of the Islamic Banking Act 1983 displaces those sections.

[107] According to learned counsel, the plaintiff is an Islamic bank, which carries on banking business whose aims and operations do not involve any element, which is not approved by the religion of Islam as defined by s 2 of the Islamic Banking Act 1983. Therefore, according to the learned counsel, in the event there is any conflict or inconsistency between the business carried by the plaintiff under the provision of Islamic Banking Act 1983 and the provision of the Companies Act 1965, the provisions of the former shall prevail.

[108] I am of the view that, the approach taken by learned counsel was incorrect.

[109] Section 55 of the Islamic Banking Act 1983 provides:

> An Islamic bank which is incorporated under the Companies Act 1965 shall be subject to the provisions of that Act as well as to the provisions of this Act, save that where there is any conflict or inconsistency *between the provisions of that Act and the provisions of this Act the provisions of this Act shall prevail.* (Emphasis added.)

[110] It is to be noted that the overriding effect of the provisions of the Islamic Banking Act 1983 would be that only when there is anything inconsistent in the said Act vis a vis the Companies Act 1965. If the former act is silent on any particular subject matter and the latter Act provides such requirement, the latter law would have to be complied with.

[111] In the case of *M Karunanidhi v Union of India,* AIR 1979 SC 898; (1979) 3 SCC 431, the Supreme Court had laid down the test for determining repugnancy between two Acts of Parliament:

(i) That there is a clear and direct inconsistency between the Central Act and the State Act.

(ii) That such an inconsistency is absolutely irreconcilable.

(iii) That *the inconsistency between the provisions of the two Acts is of such nature as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other*. (Emphasis added.)

[112] Reverting to the case before this court, I do not see any provision regarding the dealing of a company in its own shares being provided under the Islamic Banking Act 1983. Hence, there is no inconsistency in the actual terms or direct conflict for the issue of repugnancy to arise. In such a case, s 67 of the Companies Act 1965 must be complied with. Any rebuttal to the non-compliance must be dealt with in accordance with the decisions in the authorities discussed in the previous paragraphs.

[113] Section 2 relied by learned counsel for the plaintiff does only define what an Islamic Bank is and what kind of business that should be undertaken. For me, the Islamic Banking Act 1983 is regulatory in nature and does not provide for comprehensive and substantive law as the one covered under the Companies Act 1965. This court should not allow the reliance on s 2 by the Islamic Bank simpliciter for avoiding its compliance with the existing valid legislation.

Issue 4

Whether the transactions entered into between the defendants and the plaintiff were tainted with duress, coercion and threats

Duress

[114] The second defendant had pleaded that both the first and second BBAs and the MOD 1 and 2 were executed under duress, coercion and threat. Having evaluated the evidence of the second defendant before me I found that the memorandum of acceptance of the first letter of offer (pp 1–21 of document 'B1') was executed by DW1 on behalf of the first defendant. At the outset of the cross-examination by learned counsel for the plaintiff, DW1 admitted that the first letter of offer was considered by the BOD of the first defendant. When asked whether the BOD expressed concern about the first letter of offer, DW1's answer was in the negative. He reiterated that the BOD was happy with the terms offered by the plaintiff. When asked again if DW1 himself was happy with first letter of offer his answer was also in the affirmative. He added that the BOD and/or he himself could not reject the first letter of

offer as the first defendant had no choice and it was in the interest of the company that DW1 agreed with the terms of the first letter of offer.

[115] DW1 had also admitted in evidence that what he meant by duress was because the first defendant and he himself were left with no option and was advised by the plaintiff to do so. DW1 had also admitted in evidence that the decision was made by the whole BOD and not by him alone. The evidence showed that the decision was made by the BOD and there was no evidence adduced by the second defendant to demonstrate that the whole BOD was put under duress. The acceptance of the first letter of offer was executed by the second defendant himself on behalf of the first defendant. The second letter of offer which stipulated all the terms and conditions under which the plaintiff was offering the financial facilities to the first defendant. The signing of the acceptance column was made on 22 April 2009, approximately six days after the date the second letter of offer was issued (see p 111 of B1). The BOD and/or DW1 had ample time to peruse the contents of the first letter of offer and/or to seek legal opinion elsewhere if it was serious in finding about the contents and effects of the first letter of offer. The BOD and DW1 could have refused to accept the offer and/or sought financing from other available institutions. The same could be done in respect of the second letter of offer dated 22 April 2009.

[116] It had been highlighted in the case of *Pao On v Lau Yin Long* [1979] 3 All ER 65 in order for the court to ascertain if there was the contract was entered into voluntarily and/or whether there was presence of duress and/or coercion, the following circumstances must be examined:

(a) whether there was true consent;

(b) to inquire if the contracting party was coerced into making the contract;

(c) whether the said party protested;

(d) whether the party had an alternative course opened to him-adequate legal remedy; and

(e) whether an independent advice was sought.

[117] In so far as the MODs were concerned there was evidence before me that MOD 1 was executed on 23 September 2008 (see p 218 of B1) and MOD 2 (see p 94 of B1) was executed on 24 April 2009 respectively. The contents of MOD 1 and MOD 2 were similar in terms of language and substance. After signing MOD 1 on 23 September 2008 DW1 went on to sign MOD 2 on 24 April 2009 about seven months apart. If DW1 claimed that, the MODs were tainted with duress why did DW1 proceed to sign MOD 2. I had watched the manner DW1 gave his evidence in court I am satisfied that the second defendant had not shown that there were elements of duress involved in the

transactions entered into between the two parties. The certified true circular resolution passed by the BOD on 8 August 2008 proved that the first BBA was considered and passed by the BOD of the first defendant and was voluntarily made (see p 257 of document B1). PW1 and PW2 had also testified that they had not put the BOD and/or DW1 under duress before the documents were signed. DW1 had admitted that he signed the relevant documents for the purpose of the financing in order to rescue the first defendant which was facing acute cash flow problem. The resolutions by the BOD were deliberated, considered and approved by the BOD of the first defendant which consisted of eminent, highly respectable and knowledgeable person. The second defendant had not adduced evidence to demonstrate to this court how this strong BOD of the first defendant could be coerced by the plaintiff.

[118] It was also observed that the second defendant had never raised the issue of duress, coercion and threats in his affidavits filed in opposition of the O 14 application despite five affidavits having been filed. Therefore, the second defendant's defence of duress, coercion and threats to me, was an afterthought to defeat the plaintiffs claim. If it was a genuine claim it would have been raised at the earliest possible opportunity opened to the second defendant. Hence, I am satisfied the issue of duress, coercion and threats had not been proven on the standard required by the law.

Issue 5

Whether the transactions entered into between the defendants and the plaintiff were tainted with misrepresentation

Misrepresentation

[119] The second defendant contended that the officers of the plaintiff had represented to him that his liability under the MOD 2 was only limited to the value of the 16 million shares that he had pledged as security for the second BBA despite the fact that the value of the sale price was four times more. The second defendant further alleged that certain parts of the MOD 2 were surreptitiously inserted without his knowledge. If reference were to be made to cl 2.1 of MOD 1 (see p 221 of document B1) which I had highlighted at the beginning of this grounds of judgment, the second defendant had agreed to pay the whole of the indebtedness of the selling price to the plaintiff on demand by the plaintiff. Clause 23.1 of the MOD 1 (see p 228 of document B1) further provided that the second defendant's liability would only be discharged after the whole of the first defendant's indebtedness had been satisfied. Clause 6.1 of the MOD 2 stated that in the event the security pledged is sold and paid towards the indebtedness and if there is still any deficiency after the sale of the security the second defendant had agreed to make good and pay on demand to the plaintiff such deficiencies.

[120] DW1 testified that he was told by one of the officers of the plaintiff of his limited liability but he could not identify who the officer was. It was the testimony of the plaintiff through PW1 and PW2 that the documentation in respect of the BBAs and the security documents were prepared by the Corporate Documentation Unit in liaison with the Islamic Banking Department of the plaintiff. As the time between the execution of MOD 1 and MOD 2 was about seven months apart, DW1 could have detected all the clauses in MOD 1, which were not in his favour and refused to sign MOD 2. DW1 was a very successful businessman, a managing director, shareholder of an entity which had secured many contracts locally and internationally especially in the Middle East and an Executive Chairman of a public listed company.

[121] Given his impressive business background, the second defendant could have sought legal and corporate advice from other sources to caution him on the implication of signing these documents. Based on the evidence that was adduced the second defendant was a very experience businessman having the benefit of the assistance of his financial manager and company secretary to advise him on the corporate aspects of his business. He also had the benefit of the in house legal person to advise him on all legal matters. I am of the view that the second defendant had every opportunity to check the words of the BBAs and the MODs to protect his interest before he executed the same. Therefore, the second defendant could not fault the plaintiff if he later discovered that there were clauses which were detrimental to him. It is a basic and cardinal principle in contract that a person who had executed a document would be bound by the words of the document unless if he could show that the documents were executed under duress, misrepresentation and/or fraud. It is settled law that a party who had signed a document is bound by the terms and language of the document unless that party could show that there were elements of fraud, duress or misrepresentations involved (see *L'Estrange v F Graucob Ltd* [1934] 2 KB 394; *Wan Salimah bte Wan Jaafar v Mahmood bin Omar (Anim bte Abdul Aziz, intervener)* [1998] 5 MLJ 162).

[122] Based on the evidence adduced during the trial the second defendant did not prove that there were elements of duress, coercion, threats misrepresentation and fraud present on the part of the plaintiff. I am satisfied that this too was an afterthought defence and ought to be rejected by this court.

OTHER ANCILLARY ISSUES

i. Allegations of duress, threat and misrepresentation by officers of CIMB Bhd and CIMB Investment

[123] The evidence adduced by the second defendant on various matters alleged to have been done or omitted to be done by CIMB Bhd and CIMB Investment were not relevant for the purpose of the dispute between the plaintiff and the second defendant as these two entities are separate and distinct entities in law. These two entities were not brought as parties to this proceeding and they were not before this court to answer to all allegations levelled against them by the second defendant. The plaintiff being a separate legal entity could not answer for the acts of these two entities. Therefore, in law the plaintiff could not and ought not to be vicariously liable for all acts and omissions of these two entities. If it was true, as alleged, the second defendant ought to have filed a separate action against them and/or brought these parties as third parties. Hence, all documents produced by the second defendant and evidence relating to the role of these two entities were irrelevant and rejected by this court.

ii. The sale of 16 million shares of the first defendant had caused first defendant to collapse

[124] The claim by the second defendant that the sale of the 16 million shares in the first defendant by the plaintiff had caused the first defendant to collapse could not be true as evidence had been adduced that the second defendant had disposed of 25 million odd shares in the first defendant before the plaintiff disposed of the 16 million shares pledged by the second defendant in favour of the plaintiff.

[125] The points raised by the plaintiff in its submission in paras 63.9, 63.20 and 63.21 are fully endorsed and accepted by this court.

CONCLUSION

[126] On the totality of the evidence adduced by the plaintiff and the defendant through their witnesses, both testimonial and documentary, and having evaluated the evidence I am satisfied the plaintiff had discharged the onus of establishing his pleaded case against the second defendant on the balance of probabilities. Hence, the plaintiff's claim is allowed with costs. I am also satisfied that the second defendant had failed to prove his counterclaim on the balance of probabilities. Therefore, the second defendant's counterclaim is dismissed with costs. In arriving at the above decision I had carefully considered the evidence adduced by the plaintiff and the second defendant, both testimonial as well as documentary, the submissions by both by the plaintiff as well as the second defendant and the authorities tendered in support of their respective submissions. After hearing a short submission on costs I had also awarded cost of RM70,000 to be paid by the second defendant to the plaintiff.

[127] I would like to express my sincere appreciation to both learned counsel who had diligently and professionally conducted the trial before me and assisted me with their well-researched submissions to enable me to decide this case.

[128] Lastly, I would like to extend my sincere appreciation to Puan Maimoonah bt Aid (DR) and Puan Nurhannah bt Mustapha (SAR) for their diligence and kind efforts in assisting me with the research and vetting of this grounds of judgment.

Order accordingly.

Reported by Afiq Mohamad Noor